(16,748.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 211.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY, PETITIONER,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS (INTERVENING PETITIONER).

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

C. H. BOSWORTH, Receiver of the Chicago, Peoria and St. Louis Railway Company, Appellant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner, Appellee.
} No. 367.

Mr. Bluford Wilson, Mr. Philip Barton Warren, counsel for appellant; Mr. Samuel P. Wheeler, counsel for appellee.

Appeal from the circuit court of the United States for the southern district of Illinois.

Transcript of record filed November 30, 1896.
Printed record filed ——.
Filed Feb. 20, 1897.

OLIVER T. MORTON, *Clerk.*

b In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*
} In Chancery. Consolidated Cause.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

1 *Placita.*

Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. William J. Allen, district judge of said district, and in the absence of the Hon. William A. Woods, the Hon. James G. Jenkins, and the Hon. John W. Showalter, judges of the seventh judicial circuit, on Thursday, the thirtieth day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and ninety-six, and of our Independence the one hundred and twenty-first year.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company *et al.*
} In Chancery. Consolidated Cause.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

Be it remembered that heretofore, to wit, on the twenty-first day of September, in the year of our Lord one thousand eight hundred

and ninety-three came the Mercantile Trust Company, of the State of New York, by Messrs. Alexander and Geen, its solicitors, and filed in the office of the clerk of the circuit court of the United States for the southern district of Illinois, its bill for foreclosure of mortgage and appointment of receivers in case of The Mercantile Trust Company of New York against The Chicago, Peoria and St. Louis Railway Company, which said bill of complaint is as follows, to wit:

2 *Bill of Complaint of Merc. Trust Co.*

Filed Sept. 21, '93.

In the Circuit Court of the United States for the Southern District of Illinois, in the Seventh Circuit. (In Equity.)

To the honorable judges of the circuit court of the United States for the southern district of Illinois for the seventh circuit, sitting in equity:

The Mercantile Trust Company, a corporation created by and existing under the laws of the State of New York, brings this its bill of complaint against the Chicago, Peoria and St. Louis Railway Company, a corporation created and existing under *the* by virtue of the laws of the State of Illinois, as hereinafter set forth.

I. And thereupon your orator complains and says, that the Mercantile Trust Company is a corporation created by and existing under the laws of the State of New York, and having its principal office for the transaction of its business in the city of New York, in the said State of New York and is a citizen of the said State of New York, within the meaning of the laws fixing and determining the jurisdiction of this honorable court.

II. And your orator further shows, upon its information and belief, that on and prior to the first day of March, 1888, there existed a railroad corporation known as the Chicago, Peoria and St. Louis Railway Company, duly created by and existing under and by virtue of the law of the State of Illinois, and possessed of and endowed with powers, rights, privileges, franchises and immunities, granted by the law of said State, and was and is a citizen of the said State of Illinois, within the meaning of the laws fixing and determining the jurisdiction of this honorable court, and was at all times duly authorized by law to construct, lease, purchase and operate a railway beginning in the city of Pekin, in the county of Tazewell, and terminating in the city of Jacksonville, in the county of Morgan, with a branch of railway beginning in the city of Havana, in the county of Mason, and terminating in the city of Springfield, in the county of Sangamon; all in the said State of Illinois.

3 III. And your orator further shows unto your honors, that heretofore and on or about the first day of March, 1888, the said Chicago, Peoria and St. Louis Railway Company, being thereunto duly authorized, by its president and secretary and under its

corporate seal, made and executed its 1,500 bonds, known as first-mortgage five per cent. gold bonds, numbered consecutively from 1 to 1,500 inclusive, each for the sum of $1,000, bearing date on said first day of March, 1888, by the terms of which bonds the said company promised to pay to the bearer of each bond, the sum of $1,000, United States gold coin, in the city of New York, on the first day of March, 1928, and also interest thereon at the rate of five per cent. per annum, payable semi-annually, in like gold coin, in the city of New York, on the presentation and surrender of the coupons annexed to the said bonds as they severally become due, on the first days of March and September; and that annexed to said bonds were coupons in substantially the following form:

The Chicago, Peoria and St. Louis Railway Company will pay to the bearer in the city of New York, twenty-five dollars in United States gold coin, on the first day of ——, being six months' interest on bond number —.

—— ——, *Secretary.*

IV. And your orator further shows unto your honors, that on or about the said first day of March, in the year eighteen hundred and eighty-eight, for the purpose of securing the payment of the said bonds and interest, as the same should become due and payable, the said railway company made and executed a certain mortgage or trust deed, a copy of which mortgage or trust deed is hereto annexed and marked Schedule "A," and forms part of this bill of complaint. That the said mortgage or trust deed, after reciting that the railway company desired to contract a loan for the purpose of constructing, purchasing and equipping its said railway, and that a meeting of the stockholders of said railway company was held on the 20th day of September, 1887, pursuant to law, authorizing the making of the said loan and the execution of said mortgage or trust deed, and whereas, the same was unanimously authorized by the board of directors of said railway company, the said Chicago, Peoria and St. Louis Railway Company, in order to secure the payment of said bonds and all the interest to accrue thereon, in consideration of the premises and of one dollar to the said railway company duly paid by your orator, at or before the ensealing and delivery of the
4 said mortgage or trust deed, the receipt whereof was thereby acknowledged, granted, bargained and sold, conveyed, transferred, assigned and set over unto your orator, and its successors in trust, all and singular the said railway now belonging or which might thereafter belong to the said railway company, and which the said railway company was authorized by law to construct, purchase and operate as follows:

"Beginning in the city of Pekin and terminating in the city of Jacksonville, together with a branch of railway beginning in the city of Havana and terminating in the city of Springfield, all in the State of Illinois, being about one hundred and twenty miles of railway, more or less; and also all rolling stock equipment and machinery, connected or to be connected with said railway, and all franchises now held or hereafter to be acquired by the said party of

the first part, its successors or assigns, in connection therewith, including in the premises hereby granted all the railways, ways and rights of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences and other structures, and all the depots, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses and other buildings, and all machine shops and other shops, held or acquired, and which shall be held or acquired for use upon the aforesaid line of railway, or in connection with the business thereof; and including also all the locomotives, tenders, passenger, baggage and freight and other cars, and all the rolling stock and equipment, and all the machinery, tools, implements, fuel and materials for constructing, operating, repairing or replacing the said railway, or the equipments or appurtenances of the said railway, now held or hereafter to be acquired by the said party of the first part, together with all and singular the tenements, hereditaments and appurtenances of the said railway and premises, or any part thereof belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and any and every part and parcel thereof, with the appurtenances, and all books of account and vouchers kept and to be kept by the said party of the first part, which the said party of the first part now holds or shall hereafter acquire, and also twenty-five hundred shares of the capital stock of the Peoria and Pekin Union Railway Company, amounting to two hundred and fifty thousand dollars, par value. To have and to hold the said railway and premises, and all the franchises and property hereinbefore described unto the said party of the second part, and its successors in trust forever. But in trust, nevertheless, for the uses and purposes and with and subject to the powers, agreements and conditions hereinafter in that behalf mentioned and set forth."

It was further agreed in and by the said mortgage or trust deed that the said railway company should make and deliver unto your orator, and your orator should certify or countersign bonds of the said railway company to an amount not exceeding fifteen hundred thousand dollars at par, which bonds should be certified and delivered to the said railway company by your orator.

V. And your orator avers and alleges that said bonds to the amount of fifteen hundred thousand dollars were delivered to and certified by your orator, and have been issued for value and sold by said defendant to various individuals and firms, who are too numerous to be made parties to this bill of complaint.

VI. It was further agreed in and by said mortgage or trust deed that until default should be made by the railway company, or its successors or assigns, in the payment of the principal or interest of said bonds, the said railway company should be suffered and permitted to remain in the actual possession of the said railway and premises. It was further covenanted and agreed that the said railway company should keep said property so mortgaged, free from all

liens which might in any way become a prior lien to said mortgage or trust deed, or impair the liens of your orator.

VII. It was further agreed that your orator should have reasonable compensation for any services which it might thereafter render in the trust thereby created, to be paid by the said railway company; and your orator prays to refer to said mortgage or trust deed, which is hereto annexed and made part of this bill of complaint, for the other terms of said mortgage or trust deed.

VIII. And your orator further shows unto your honors, that on the first day of September, 1893, there became due and payable, and accruing upon the bonds secured by said mortgage or deed of trust, and then actually outstanding, the semi-annual installment of interest, evidenced by the coupons attached to said bonds, amounting to the sum of $37,500; that default was made in the payment of the interest on the said bonds, and said installment and interest accruing on said bonds as aforesaid; that the
6 said railway company wholly failed, omitted and refused to pay the said installment of interest, and to pay the interest mentioned and provided for in the said coupons due on said last-mentioned day, or upon any of them, but thereon wholly made default; that said coupons were on that day actually presented for payment at the place where the same were and are payable, to wit, in the city of New York, and payment thereof was demanded and refused, and such default and failure to pay still continues.

IX. Your orator further shows unto your honors, that the holders of a large amount in value of said general consolidated mortgage bonds now actually outstanding, have in writing requested your orator to enforce the remedies provided in said mortgage or trust deed.

X. And your orator further shows unto your honors, that it is informed and believes that the said railway company is insolvent and unable to pay its floating debt and current, and presently accruing indebtedness.

XI. Your orator further shows, that the said mortgaged property is insufficient and inadequate security for the payment of the outstanding bonds secured by the said mortgage; that there is danger that the said property may be sold under judgments, and that the property and lines of said company may be separated and broken up, and the earning capacity destroyed or impaired by the contests of creditors for conflicting claims, and the mortgaged premises wasted and depleted.

XII. Your orator further shows unto your honors, that no proceedings at law have been had, nor any suit or action commenced by or on behalf of your orators or any holder of any of the bonds of the company secured by the mortgage aforesaid, for any interest unpaid or accrued thereon, except only this action.

In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and *are* only relievable in a court of equity, where matters of this kind are properly cognizable and relievable.

Your orator, therefore, prays the aid of this honorable court, and

that the said mortgage or deed of trust may be decreed to be a lien upon all the property mentioned and described therein, and upon all the property, real, personal or mixed, rights, franchises,
7 lands, titles, railroads, branches, extensions, tolls, incomes, rents and issues of the said railway company, described in the said mortgage or trust deed, within the jurisdiction of this honorable court, and that the said railway company may be decreed to pay unto your orator and the other bondholders under aforesaid mortgage or deed of trust all arrears of interest now due, or that may hereafter become due and payable upon said bonds, together with all the costs and expenses in this behalf incurred and expended. And, in default thereof, that the said defendant above named, and all persons claiming under it, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises, and every part and parcel thereof, and that all and singular the said mortgage premises, within the jurisdiction of this honorable court, with the appurtenances, property and effects, rights, immunities and franchises in the said mortgage mentioned, may be sold under a decree of this honorable court, and that out of the money arising from the sale thereof, after deducting from the proceeds of any such sale just allowances for all disbursements and expenses of the said sale, including attorneys' and counsel fees, and the reasonable charges of your orator for services rendered as trustee and for all expenses incurred by it in the premises, and all payment which may be made for taxes or assessments on the said premises, or any part thereof, to apply the said proceeds to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall previously have become due, and of the interest which shall at that time have accrued on the said principal and be unpaid, without discrimination or preference, ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest.

And your orator further prays, that an account may be taken of the bonds secured by the said mortgage, and of the amount due on said bonds for principal and interest, or either; and the names of the lawful holders thereof may be ascertained.

And your orator further prays, that a receiver may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases of all the property, equitable interests, things in action, effects, money, receipts and earnings, rights, privileges, franchises and immunities of the said railway company, and its tolls, incomes, rents and issues and of all other property included in and covered by the said mortgage within the jurisdiction of this honorable court, and that the defendants be decreed
8 to make such transfer or conveyances to such receiver, and to the purchasers of said property at any sale as aforesaid, as may be necessary and proper to put them or either of them in possession and control of said property.

And your orator further prays, that a writ of injunction issuing out of and under the seal of this honorable court, or issued by one

ur honors, according to the form of the statute in such case
e and provided, directing, commanding, enjoining and restrain-
he said defendants, and each and every one of them, from in-
ring with, transferring, selling and disposing of any of the
erty mentioned in and covered by the said mortgage, or from
ng possession of, levying upon or attempting to sell, either by
ial process or otherwise, any portion of the property embraced
covered by said mortgage; and that your orator may have
further or other relief in the premises, as the nature of the cir-
stances of this case may require, and to this honorable court
seem meet.

nd may it please your honors to grant unto your orator a writ
junction, issuing out of and under the seal of this honorable
t, or issued by one of your honors, according to the form of the
te in such case made and provided, directing, commanding,
ining and restraining the said defendants, and each and every
of them, from interfering with, transferring, selling or dispos-
of any of the property mentioned in or covered by the
mortgage, or from taking possession of, levying upon or at-
pting to sell, either by judicial process or otherwise, any portion
e property embraced in or covered by the said mortgage. And
it please your honors to grant unto your orator a subpœna of
United States of America issuing out of and under the seal of
honorable court, directed to The Chicago, Peoria and St. Louis
way Company, the defendant, therein and thereby command-
it, on a day certain therein to be named and under a certain
lty, to be and appear before this honorable court, then and
e to answer (but not under oath) all and singular the premises,
to stand to, perform and abide by the said order, direction and
ee as may be made against it in the premises as shall seem meet
and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, etc.

THE MERCANTILE TRUST COMPANY,

[SEAL.] By EDW. L. MONTGOMERY, *V. P.*

ALEXANDER & GREEN,
Solicitors for Complainant.

HARLES B. ALEXANDER,
ILLIAM D. GUTHRIE,
Of Counsel.

TED STATES OF AMERICA,
Southern District of New York, } ss:

dward L. Montgomery, being duly sworn, says: that he is the
president of The Mercantile Trust Company, the complainant
he foregoing bill of complaint; that he has read the foregoing
of complaint and knows the contents thereof; that the allega-
s therein contained, as far as they relate to his own acts, are
and as far as they relate to the acts of others he believes them
e true.

That in regard to all matters and things in the foregoing bill of complaint alleged which are not within the personal knowledge of this deponent, the deponent has been fully informed and he believes that the same are true.

EDW. L. MONTGOMERY. [SEAL.]

Sworn to before me, this 19th day of September, 1893.

[SEAL.] JOSEPH M. DEUEL,
U. S. Commissioner for the Southern Dist. of N. Y.

10 EXHIBIT A.

Mortgage.

EXHIBIT "A" TO BILL OF COMPLAINT.

Mortgage. Filed Sept. 21, '93.

This indenture, made the first day of March, in the year of our Lord one thousand eight hundred and eighty-eight, between the Chicago, Peoria and St. Louis Railway Company, a corporation of the State of Illinois, of the first part, and the Mercantile Trust Company, of New York City, trustee, of the second part, witnesseth, that,

Whereas, the said party of the first part is duly authorized by law to construct, lease, purchase and operate a railway beginning in the city of Pekin, in the county of Tazewell, and terminating in the city of Jacksonville, in the county of Morgan, with a branch railway beginning in the city of Havana, in the county of Mason, and terminating in the city of Springfield, in the county of Sangamon, all in the State of Illinois.

And whereas, the said party of the first part desires to contract a loan for the purpose of constructing, purchasing and equipping its said railway.

And whereas, at a meeting of the stockholders of said railway company, held on the 20th day of September, A. D. 1887, pursuant to law, resolutions were passed by a vote of more than three-fourths of the outstanding stock of said company, whereby the board of directors was authorized, for the purpose of constructing, purchasing, and equipping its railway to contract for a loan and to secure the payment of the same by mortgage of its corporate property and franchises acquired and to be acquired.

And whereas, at a meeting subsequently held, a quorum being present, the board of directors of said company, by resolution unanimously adopted, authorized the president of said company to negotiate a loan as proposed by said stockholders, as aforesaid.

And whereas, in pursuance of the power and authority duly vested in it, the said party of the first part, in order to defray its obligations in connection with the construction, purchase and equipment of said railway, is about to issue a series of bonds, the aggregate

amount whereof to be at any time outstanding is limited
11 to fifteen hundred thousand dollars in said bonds, at par;
which said bonds shall be of like tenor and date, and for one thousand dollars each, and be payable in forty years from date, in gold coin of the United States of America, at the city of New York, and bear interest at the rate of five per cent. per annum, payable semi-annually, in the like gold coin, at the said city of New York, which payment of interest shall, in all cases, be made without deduction for State or United States taxes.

And whereas, the said bonds are, or are to be, all of like tenor and date, and in substantially the following form:

No. —. $1,000.

"*The Chicago, Peoria and St. Louis Railway Company*" *First-mortgage Five per Cent. Gold Bond.*

The Chicago, Peoria and St. Louis Railway Company, for value received, hereby acknowledges itself indebted to the bearer in the sum of one thousand dollars in United States gold coin, which indebtedness it promises to pay on the first day of March, A. D. 1928, in the city of New York, with interest thereon from the first day of March, A. D. 1888, at the rate of five per cent. per annum, payable semi-annually in the city of New York, on the presentation and surrender of the annexed coupons as they severally become due. If the obligor, or its successors, shall make default in the payment of the semi-annual interest on this bond for six months from the day it becomes due, then without demand or notice, the whole principal thereof shall become due and payable, and may at once be enforced against this company or its successors.

This bond is one of a series of similar bonds issued, and to be issued from time — time by said railway company, the aggregate amount whereof to be at any time outstanding is limited to fifteen hundred thousand dollars in said bonds, at par; and the payment of this bond, in common with the other bonds of said series, is secured by a deed of trust, or mortgage, bearing even date herewith, and conveying to the Mercantile Trust Company of New York City, trustee, all and singular the Chicago, Peoria & St. Louis railway, beginning in the city of Pekin and terminating in the city of
Jacksonville, with a branch railway beginning in the city of
12 Havana and terminating in the city of Springfield, all in the
State of Illinois, together with the equipment and appurtenances of the said railway, and all rights, privileges and franchises thereunto appertaining.

This bond shall not be valid or obligatory until the certificate authenticating the same, which is endorsed hereon, shall have been duly signed by the said trustee.

In witness whereof, the said railway company has caused its corporate seal to be hereunto affixed and the same to be attested by the signatures of the president and secretary, and has likewise caused the signature of the secretary to be affixed to the several coupons

hereunto annexed, at the city of Jacksonville, in the State of Illinois, this first day of March, A. D. 1888.

"THE CHICAGO, PEORIA AND ST. LOUIS
[SEAL.] RAILWAY COMPANY,
By —— ——, *President.*
—— ——, *Secretary.*"

STATE OF ILLINOIS, }
United States of America. }

"*Trustee's Certificate.*"

The Mercantile Trust Company of New York City hereby certifies that this bond is one of a series of bonds issued under the within-mentioned mortgage, or deed of trust.

THE MERCANTILE TRUST COMPANY, *Trustee,*
By —— ——, *President.*

And whereas, each of the said bonds has coupons thereto annexed, representing the several installments of interest to become due thereon, and said coupons bear the engraved signature of the secretary of said company, and are in substantially the following form:

(*Form of Coupon.*)

The Chicago, Peoria and St. Louis Railway Company will pay to the bearer in the city of New York, twenty-five dollars in
13 United States gold coin on the first day of —— 1— being six months' interest on bond, No. —.

—— ——, *Secretary.*

And whereas, it is the true intent and meaning of these presents that each and all of the said bonds, whether now executed or hereafter to be executed, shall be equally secured to be paid by these presents.

Now, therefore, this indenture witnesseth, that the said party of the first part, in order the better to secure the payment of said bonds and all of the interest to accrue thereon, and for and in consideration of the premises, and of the sum of one dollar to the party of the first part, duly paid by the said part- of the second part, at or before the ensealing and deliver- of these presents, the receipt whereof is hereby acknowedged, hath granted, bargained and sold, and by these presents doth grant, bargain, sell, convey, transfer, assign and set over unto the said party of the second part and its successors in trust, all and singular the said railway now belonging, and which may hereafter belong, to the said first party of the first part, and which the said first party of the first part is by law authorized to construct, purchase and operate, beginning in the city of Pekin and terminating in the city of Jacksonville, together with a branch railway beginning in the city of Havana and terminating in the city of Springfield, all in the State of Illinois, being about one hundred and twenty miles of railway, more or less; and also

all rolling stock, equipment and machinery connected or to be connected with said railway, and all franchises now held or hereafter to be acquired by the said party of the first part, its successors or assigns, in connection therewith, including in the premises hereby granted all the railways, ways, and rights of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences and other structures, and all the depots, stations, station-houses, engine houses, car-houses, freight-houses, wood-houses and other buildings and all machine shops and other shops, held or acquired, and which shall be held and acquired, for use upon the aforesaid line of railway, or in connection with the business thereof; and including also all the locomotives, tenders, passenger, baggage, freight and other cars, and all the rolling stock and equipment, and all the machinery, tools, implements, fuel and materials for constructing, operating, repairing or replacing the said railway, or the equipments or appurtenances of the said railway, now held
14 or hereafter to be acquired, by the said party of the first part, together with all and singular the tenements, hereditaments and appurtenances to the said railway and premises, or any part thereof belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues and profits thereof, and also all the estate, right, title, interest, property possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and any and every part and parcel thereof, with the appurtenances and all books of account and vouchers kept and to be kept by the said party of the first part, which the said party of the first part now holds or shall hereafter acquire, and also twenty-five hundred shares of the capital stock of the Peoria and Pekin Union Railway Company, amounting to two hundred and fifty thousand dollars, par value. To have and to hold the said railway and premises, and all the franchises and property hereinbefore described unto the said party of the second part, and its successors, in trust forever. But in trust, nevertheless, for the uses and purposes and with and subject to the powers, agreements and conditions hereinafter in that behalf mentioned and set forth.

And this indenture further witnesseth, that for the consideration aforesaid, and in order the better and more effectually to secure the payment of said bonds, and of all interest to accrue thereon the said party of the first part has covenanted, promised, granted and agreed to and with the said party of the second part and its successors, as follows, to wit:

Article first. The party of the first part shall make, execute and deliver unto the said party of the second part, and the said party of the second part shall certify or countersign bonds of the party of the first part intended to be secured hereby to an amount not exceeding fifteen hundred thousand dollars ($1,500,000) at par, which bonds shall be certified and delivered to the party of the first part by the party of the second part.

Article second. Until default shall be made by the said party of the first part, its successors or assigns, in the payment of interest or

principal of said bonds, or in the due observance of the covenants and agreements hereinafter contained on the part and behalf of the said party of the first part, the said party of the first part, its successors and assigns, shall be suffered and permitted to remain in the actual possession of said railway and premises, and to exercise the franchises and rights relating thereto, and to collect, receive and use revenues and profits thereof in any manner which will not impair the lien created by these presents.

And the said party of the first part hereby covenants, promises and agrees to and with the said party of the second part and its successors, that the said party of the first part, its successors and assigns, remaining in the possession of the said railway and premises, shall and will keep the said railway in good order and safe running condition, and shall and will from time to time pay and discharge all taxes, assessments and governmental charges, which may be lawfully imposed upon the said railway and premises, or upon any part thereof, and the lien of which might or could be held to be prior to the lien of these presents, so that the priority of these presents may be duly preserved, and that the said party of the first part will not do or suffer any act or thing whatsoever, whereby the lien hereof may or can be impaired, until the said bonds and all interest thereon shall be fully paid and satisfied.

Article third. In case default shall be made in the payment of any semi-annual installment of interest which may accrue upon the said bonds, or upon any of them, when such interest shall become due and be demanded, and such interest, or any part thereof, shall remain unpaid and in arrears for the period of six months, or in case default shall be made in the due observance and performance of the covenant of further assurance hereinafter set forth, or in the payment of any taxes, assessments or other governmental charges, which may be lawfully levied or imposed upon the said railway and premises or upon any part thereof, and either of said last-mentioned defaults shall continue for the period of six months, or in case default shall be made in the payment of the principal of said bonds, or of any one of them, then, and in any and every such case of default, it shall be lawful for the said party of the second part as the trustee, under these presents, or for any successors of the said party of the second part in the trust created by these presents, to enter into and upon the railway and premises hereinbefore granted or conveyed, and each and every part of the same, and from thenceforth the said railway and premises and each and every part thereof, and all and singular the rights and franchises hereinbefore granted, to have, hold and enjoy, operating the said railway by such superintendents, managers, receivers, assistants and servants, or other attorneys or agents as the said trustees shall deem proper, and making from time to time all such repairs and replacements, and all such useful alterations, additions and improvements to the said railway and premises as the said trustee may deem expedient and judicious. And it shall likewise be lawful for the said trustee, after any and every default happening and continuing as aforesaid, to collect and receive all revenues and

profits of the said railway and premises, and of every part and parcel thereof, and after deducting therefrom all the expenses lawfully incurred in making such entry, or in otherwise obtaining possession of said premises, including reasonable attorney and counsel fees, as well as any and all expenses of holding, operating and managing the said railway and premises, and conducting the business thereof, including the costs and expenses of all such repairs, replacements, alterations, additions and improvements, as may be made by said trustee as aforesaid, and all payments which may be made or be due for taxes and assessments, or other charges or liens prior to the liens of these presents upon the said railway and premises, or upon any part or parcel thereof; and just compensation for the trustee's own services, to apply any and all revenues and profits of the said railway and premises which may be received by said trustee as aforesaid, to the payment, first, of all overdue interest on the said bonds with interest thereon, and secondly, to the payment of all interest accruing during such possession of said trustee, which payment of interest shall be made to the holders of the bonds and coupons, evidencing the right to the same, ratably and without discrimination or preference between them.

Article fourth. It is hereby mutually agreed, that any sale of the railway and property hereinbefore conveyed, which may be made for the purpose of enforcing the lien of these presents, the trustee under these presents for the time being, may, in his own discretion, and not otherwise bid for, and if the same be obtainable at the price hereinafter mentioned purchase and acquire the property so offered for sale, in behalf of all the holders of the bonds aforesaid, which shall then be outstanding in proportion to the amount of said bonds, and of the overdue coupons thereunto belonging, by them respectively held.

Provided, however, that nothing herein contained shall authorize the said trustee to bid for the entire property then held upon the trusts of this indenture on behalf of the holders of said bonds, a sum exceeding the whole amount of said bonds then outstanding with the interest accrued thereon, and the expenses of such sales or an amount reasonable proportionate thereto for any part of the said property.

17 And it is hereby further agreed, that the bonds and overdue coupons aforesaid, or any of them shall be received in payment, on account of the purchase-money of any property which shall be offered for sale as aforesaid, as equivalent to so much of the said purchase-money as would be distributable and payable thereon out of the proceeds of such sale.

Article fifth. In case default shall be made in the payment of any semi-annual installment of interest to accrue on any of the said bonds when such interest shall become payable, and if such interest shall remain unpaid and in arrear for the space of six months, then and in each and every such case of the happening and continuing of such default in the payment of interest, the principal of each and all of the said bonds may be declared by the trustee for the time being hereunder, or by a majority in interest of the holders of all

the said bonds which may then be outstanding and unpaid, at the option of such trustee, or of such majority in interest of bondholders, to be and thereupon the same shall become and be due, and payable immediately, notwithstanding that the time limited in said bonds for payment thereof may not then have elapsed.

Article sixth. It is hereby expressly declared and agreed, that in case default shall be made in the payment of interest upon any of the said bonds when such interest shall become due and be demanded, and such default shall continue for the space of six months, or in case default shall be made in the payment of the principal of any of the said bonds when the same shall become due, then, and in either and every such case of default, it shall be the duty of the trustee for the time being, under these presents, to take appropriate proceedings at law or in equity to enforce the rights of the holders of said bonds upon a requisition to that effect being made upon the said trustee, signed by holders of, at least, one-third in amount of the said bonds then outstanding.

Article seventh. The trustee, under these presents, shall have at all times, while the said bonds or any of them remain outstanding, and is hereby granted, full power and authority, to be exercised in the discretion of said trustee and not otherwise, to release from the lien and operation of these presents in such manner as it may be advised upon the request in writing of the said party of the first part, its successors or assigns, any portion of the aforesaid premises,
not being a part of the main line of the said railway which,
18 in the judgment of such trustee, shall not be necessary for
use in connection therewith, and which shall have been acquired for station or depot purposes, or for shops or other buildings, or for supplying fuel, gravel, or other material, but which, in the judgment of such trustee, it shall have become unnecessary or inexpedient to retain in consequence of its having become necessary or desirable to change the location of such depot, shop or other building, or to substitute other lands for the purpose of supplying such fuel, gravel or material; provided, always, that any and all lands and premises which shall be acquired for station or depot purposes, or for shops or other buildings, or for the purpose of supplying fuel, gravel or other material, shall be conveyed to the said trustee to be held by it, upon the trusts of these presents in the same manner as the premises so released. And the said trustee may also allow the said company, its successors or assigns to dispose of any rolling stock, equipment and machinery or other personal property, which may be held for use upon or in connection with said railway, or the business thereof, but which, in said trustee's judgment, shall have become unfit, or undesirable for such use; provided, always, that any and all rolling stock, equipment and machinery or other personal property which may be acquired in substitution for any similar property so disposed of, shall become and be subject to the lien of these presents.

Article eighth. It is hereby expressly declared, and these presents are upon the condition, that if the said party of the first part shall well and truly pay and discharge the interest on each and every of

the said bonds as the same shall mature, and shall well and truly pay and discharge the principal of each and every of the said bonds when such principal shall become due and payable, according to the true intent and meaning of said bonds, and of these presents, and shall well and truly keep and perform the other covenants and agreements in these presents contained, to be by it kept and performed, then these presents, and all the estate and interest thereby granted shall cease, determine and become void, otherwise the same shall be and remain in full force and virtue; and the said party of the first part hereby covenants, promises and agrees to and with the said party of the second part and to and with its successors in trust, that the said party of the first part shall and will well and truly pay the said bonds, and all interest to accrue thereon, at the times and in the manner in said bonds mentioned, and according to the true intent and meaning thereof.

Article ninth. It is hereby declared and agreed that the trustee under these presents shall be entitled to a reasonable 19 compensation for any services which the said trustee may hereafter render in the trust hereby created to be paid by the said party of the first part, that the said trustee shall not be answerable for the default or misconduct or any agent or attorney, who may be appointed by it in pursuance of these presents, if such agent or attorney be selected with reasonable care, and that the said trustee shall not be answerable or accountable for anything whatever in connection with said trust, but gross negligence or willful misconduct or default. And it is further declared and agreed that the trustee hereunder, may at any time be removed by a majority in interest of the *bona fide* holders of said bonds, provided such removal be made by an instrument in writing under seal, duly executed and acknowledged; that the said trustee may resign the trust under these presents at any time by giving sixty days' notice, in writing, of the intention so to do, to the said party of the first part, and to such of the holders of said bonds as shall have registered with such trustee their names and post-office addresses provided such notice of resignation be served on the said party of the first part at its principal office, and on the bondholders who shall have so registered their names and addresses with said trustee, by the deposit thereof in the mail directed to the said bondholders respectively. And it is further agreed and declared, that in case the trustee, hereby appointed, or any successor of such trustee, shall at any time hereafter resign the said trust, or be removed therefrom, as aforesaid, another trustee or trustees may and shall be appointed by a majority in interest of the holders of said bonds, by an instrument in writing duly signed by such majority in interest of such bondholders, or by the vote of a majority in interest of said bondholders, given at a meeting of such bondholders, duly convened and held as hereinafter provided.

And it is further agreed and declared, that in case the appointment of a trustee shall be unduly delayed, and the trust shall remain vacant for more than sixty days, any holder or holders of said bonds to the aggregate amount of one thousand dollars or up-

wards, upon reasonable notice to the said party of the first part, may apply to any court of competent jurisdiction for the appointment of a new trustee, but no bondholder shall be entitled to make such application to court until a reasonable time, to wit: sixty days shall have been allowed for the purpose of enabling a majority in interest of said bondholders to appoint a new trustee as aforesaid.

And it is hereby further agreed, that it shall be the duty of any trustee resigning or being removed as aforesaid, to execute, acknowledge and deliver, not at his own cost or expense, but at the cost and expense of the party of the first part, any and all deeds or instruments which such trustee may be reasonable requested by the said new trustee to execute for the purpose of assuring the title in said premises to such new trustee.

And it is hereby further expressly declared and agreed, that whenever and as often as any contingency shall arise in which the action of a majority in interest of the bondholders of said bonds shall be necessary, or in which the said bondholders are herein declared to have any discretionary voice or power, the trustee hereunder shall be and is hereby authorized and empowered, at the proper cost and expense of the said party of the first part, to call a meeting of all the holders of bonds secured hereby, to be held in the city of New York, by advertisement to be published three times in each week for four weeks in one newspaper of good circulation amongst the business community in that city, and in default of such meeting being called by said trustee within ten days after notification in writing by any bondholder of the necessity therefor it shall be competent for any holder or holders of said bonds to the aggregate amount of one hundred thousand dollars, to call said meeting in the manner aforesaid.

Provided, however, that at any meeting called as aforesaid, a majority in interest of the holders of said bonds may prescribe and establish such rules as they may deem proper for the calling of future similar meetings, and the regulation of the proceedings thereof. And it is hereby declared and agreed, that at any meeting convened and held pursuant to these presents, the holders of said bonds shall be competent to exercise in person, or by proxy, all the powers and authority conferred upon them by these presents.

Provided, nevertheless, that any person appearing at said meeting of bondholders and claiming the right to participate therein, shall, if requested by any bondholder present thereat, produce the bond or bonds upon which such person may claim the right to vote at such meeting, or file an affidavit with the chairman of the meeting that he, the person so claiming the right to participate in such meeting, is the holder of one or more of the bonds aforesaid, or the proxy of such holder, in which affidavit he shall specify the amount and number of the bonds which he claims to hold, or represent, before being allowed to vote at such meeting, except for the purpose of temporarily organizing the same, and on the adjournment of such meeting all such affidavits shall be delivered to the trustee under these presents.

21 And this indenture further witnesseth, that the said party of the first part, for the consideration aforesaid, has promised and agreed, and does hereby covenant, promise and agree to and with the said party of the second part, and its successors, that the said party of the first part, its successors and assigns, shall and will well and truly pay, or cause to be paid, unto the holder or holders of said bonds, the principal and interest thereof, as the same shall become payable according to the tenor of said bonds and the terms of the coupons thereto annexed; and shall and will do, observe and perform any and every act and thing mentioned in or required by these presents, to be by it or them done, observed and performed, and that the said party of the first part, its successors and assigns, shall and will, from time to time, and at all times hereafter, and as often as thereunto requested by the trustee under this indenture, execute, acknowledge and deliver all such further deeds, conveyances and assurances in the law for the better assuring unto the said party of the second part, and unto its successors, upon the trusts herein expressed, the railway, equipments, appurtenances, franchises, property and things hereinbefore mentioned, and particularly any and all franchises whatsoever, which shall or may at any time hereafter, while the said bonds, or any of them remain unpaid, be acquired by the said party of the first part, its successors or assigns, as by the said trustee or by its counsel, learned in the law, shall be reasonably advised, directed or required.

In witness whereof, the said party of the first part has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and secretary on the day and year first above written, and the said party of the second part, in order to evidence its acceptance of the trust hereby created, has also caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary.

THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY,

By —— ——, *President.*

[Corporate Seal.]

Attest: —— ——, *Secretary.*

THE MERCANTILE TRUST COMPANY OF NEW YORK CITY, *Trustee,*

By —— ——, *President.*

[Corporate Seal.]

Attest: —— ——, *Secretary.*

(Indorsed:) Filed September 21, 1893. James T. Jones, clerk.

22 And afterwards, to wit: on the 21st day of September, in the year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

In the Circuit Court of the United States for the Southern District of Illinois, *ss:*

THURSDAY, *September* 21*st*, *A. D.* 1893.

Present: Hon. William J. Allen, district judge.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
THE CHICAGO, PEORIA AND ST. LOUIS RAILway Company, Defendant.
} In Equity. Consolidated Cause.

Order Appointing Receivers.

Now comes the Mercantile Trust Company of New York, by Alexander & Green, its solicitors, and C. B. Alexander, of counsel and come also R. J. Cavett, receiver, John M. Coughlin, *et al.*, Woodward & Tiernan Printing Company, St. Louis & Eastern Railway Company, by Bluford Wilson, their solicitor; comes also the Atchison, Topeka & Santa Fe Railroad Company, by George R. Peck, its solicitor; comes also the Chicago, Peoria and St. Louis Railway Company, by I. L. Morrison, its solicitor, and said parties, except the said defendant, The Chicago, Peoria & St. Louis Railway Company, move for the appointment of a receiver of all and singular the premises and property in the said bill of complaint of the Mercantile Trust Company and of the said several intervening bills, petitions and cross-petitions consolidated therewith, upon consideration whereof, and it appearing to the court from the papers filed in said causes consolidated that a receiver or receivers should be appointed for the property described in the said several bills, petitions and cross-petitions, the said Chicago, Peoria & St. Louis Railway Company objecting thereto, it does hereby order, adjudge and decree that C. H. Bosworth, of the city of Springfield, Illinois, and E. Ellery Anderson, of New York city, be and they are hereby appointed receivers of all and singular the said property above mentioned upon re-
23 spective-y executing a bond with good and sufficient security to be approved by this court, in the sum of fifty thousand dollars each, conditioned for the faithful performance of their several duties as such receivers respectively for obeying all the lawful orders of the court herein. Such bond may in the case of E. Ellery Anderson be executed before and the justification taken before a commissioner for the southern district of New York, and the surety may be approved by one of the judges of the circuit court of the United States for the southern district of New York, and upon approval of said bond and upon taking the official oath shall be sufficient qualification as receiver, the one first qualifying taking possession for the two jointly and such receiver shall forthwith be in possession of, operate and maintain said railroad and premises alone until the other receiver is qualified, being the railroad of the Chicago, Peoria & St. Louis Railway Company, comprising also the Jacksonville, Louisville & St. Louis Railroad

Company, the Litchfield, Carrollton & Western Railroad Company and the Louisville & St. Louis Railway Company, and including a partially constructed line of railway northwestwardly from Havana, together with all the constituent railroad lines now operated by said Chicago, Peoria & St. Louis Railway Company, commonly known as the "Jacksonville Southeastern line," more fully and particularly described as follows, to wit: Extending, lying and being a railroad from the city of Pekin through the counties of Tazewell, Mason, Cass, to and through the city of Jacksonville in the county of Morgan, and thence through the said county of Morgan and the counties of Macoupin and Montgomery to and through Litchfield, and thence through the counties of Montgomery, Macoupin, Madison and St. Clair, to East St. Louis, in the last-named county: and from Litchfield southeasterly through the counties of Montgomery, Bond and Clinton to Centralia, in the county of Marion, and thence through the county of Marion to Drivers, in the county of Jefferson; and from Havana, in said county of Mason to Petersburg, in the county of Menard, and thence to Springfield, in the county of Sangamon; also from Barnett westerly through Carlinville, in said county of Macoupin, thence through Carrollton, in the county of Greene to Columbus on the Illinois river, together with all interests in and contract rights and privileges for the use of the Peoria & Pekin Union railway from the said city of Pekin to the city of Peoria in the county of Peoria, and all terminal contract rights and privileges at East St. Louis, all in the State of Illinois, together with all equipment owned, leased or held in car trusts or otherwise, and the tolls, rents, incomes, franchises, issues and profits of the said Chicago, Peoria & St. Louis Railway Company, and its said constituent companies, and all their appurtenances as well as their land and other premises as now held, used and operated by the said company as fully described in their existing mortgages, deeds of trust, leases, contracts and other evidences of title and possession, reference thereto for greater certainty to be had, with all property rights, powers, privileges and franchises and equities now owned, possessed, held or controlled by the said The Chicago, Peoria & St. Louis Railway Company, it being the purpose and intention of this order to clothe the said receiver with all property rights, powers, privileges and franchises now owned, possessed, held or controlled by the said The Chicago, Peoria & St. Louis Railway Company, or any of the said constituent or affiliated lines now under a common management as the Jacksonville Southeastern line.

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It is further ordered, adjudged and decreed, that the said Chicago, Peoria & St. Louis Railway Company, its officers, agents, servants, employees and any and all persons in any way having the custody of any property or funds belonging to said railway company in any way shall turn over to the said receivers or receiver, on demand any and all property to which said receivers or receiver are entitled under this order, together with all books, moneys, assets, accounts, choses in action and property of every nature and kind belonging to or in the possession of the said defendant company or any of its constituents, and all persons are hereby forbidden in any manner

to interfere with the possession of said receivers or receiver or to prosecute any suit or suits against the defendant railway company without the consent of the court first had and obtained.

And the said receivers are hereby clothed with all the authority and rights usually given to receivers by courts of equity, to take charge of, care for and operate a railroad; to make report of his acts and doings at least every month to the court, and at any other time when ordered by the court; to collect and receive the tolls, rents, moneys, issues and profits of said premises and property as covered by this order, and out of the same they shall put, maintain and keep said property in good repair, and shall further pay—

First. All past-due taxes.

Second. All current operating expenses.

Third. All past-due wages as shown by the pay-rolls and on such proof as shall be satisfactory to the receiver or receivers.

Fourth. All claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket trackage traffic balances due from said railroad. To which last item number four counsel for the Mercantile Trust Company, trustee, objects, and which objection the court upon argument overrules. In their reports, so ordered to be made of receipts and expenditures and their doings under this order, the said receivers shall report whether there are any funds in their hands accruing from said income applicable to payment of interest or principal of any indebtedness of the said Chicago, Peoria and St. Louis Railway Company, or any of the constituent companies out of which by consolidation, lease or otherwise it has been formed, and power and authority are hereby reserved to any party interested in any of the constituent companies out of which said company was formed, to apply to the court for a direction to the receivers to keep an account of the receipts and expenditures of such constituent company so as to preserve and secure any special rights which the court may find to exist in favor of such constituent company, and all other matters not included in this order are reserved for the future consideration of the court.

And the said C. H. Bosworth comes and files his bond which is approved by the court, and takes the oath of office and accepts the office of receiver hereby conferred upon him.

And afterwards, to wit, on the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and ninety-five, came the Terminal Railroad Association of St. Louis and filed in the clerk's office of said court its intervening petition in said consolidated cause, which petition is as follows, to wit:

26 *Intervening Petition of Terminal Railroad Ass'n of St. Louis.*

Filed May 27, '95.

In the Circuit Court of the United States, Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF New York *et al.* *against* THE CHICAGO, PEORIA & ST. LOUIS Railway Company *et al.* } Consolidated. In Equity.

Intervening petition of the Terminal Railroad Association of St. Louis.

Now comes the Terminal Railroad Association of St. Louis, a railroad corporation organized and existing under the laws of the State of Missouri, and by leave of court first had and obtained presents and filed this its intervening petition in the above-entitled cause, and for ground of intervention states:

That between the twenty-first day of March, 1893, and the twenty-first day of September, 1893, and within six months prior to the appointment of the receiver herein, it performed certain labor and furnished certain materials for, and to, and at the request of The Chicago, Peoria and St. Louis Railway Company, one of the defendants above named, the items of which are fully set forth in the statement of account herewith filed, marks "Exhibit A," and made a part hereof; which said account fully and correctly states the character and items of labor performed and materials furnished, and the times at which such labor was performed and materials furnished, and the respective charges therefor, which charges were the charges agreed upon between this intervenor and the said Chicago, Peoria and St. Louis Railway Company, and are fair and reasonable; that separate bills for each of said items comprising said account were furnished to and approved by said Chicago, Peoria and St. Louis Railway Company prior to the appointment of the receiver herein; and that all of said labor was performed and materials furnished within six months prior to the appointment of said receiver.

Wherefore this intervenor presents this its claim for the aggregate of said items of labor and material, fully set forth in said account herewith filed, amounting to the sum of eight thousand one hundred and sixty-two and eleven one-hundredths dollars ($8,162.11), and prays that the same may be allowed and ordered to be paid under the order of this court heretofore made herein directing
27 the payment by the receiver of debts incurred by said Chicago, Peoria and St. Louis Railway Company within six months prior to the appointment of the receiver.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
By W. M. WATTS, *Solicitor.*

Chicago, Peoria & St. Louis R'y in acc't with Terminal R. R. Ass'n of St. Louis.

Statement of Unpaid Bills.

No. of bill.	What for.	Amount.
12121	Switching card, April, 1893	$528.00
12327	Breaking up trains, May, 1893	488.50
12403	Engine repairs, May, 1893	415.35
12467	Switching cars, May, 1893	698.50
12684	Breaking up trains, June, 1893	375.50
12717	Car repairs, June, 1893	2.63
12718	Engine repairs, June, 1893	388.88
12884	Switching cars, June, 1893	493.50
13015	Breaking up trains, July, 1893	668.00
13023	1/5 expense joint inspection, July, 1893	37.24
13048	Engine repairs, July, 1893	352.41
13146	Setting cars for transfer, July, 1893	5.00
13147	Cutting out cars, July, 1893	10.50
13148	Weighing cars, July, 1893	6.00
13149	Switching cars, July, 1893	599.00
13331	Pro expense, July, 1893	12.22
13342	Switching coaches, April & July, 1893	6.00
13363	Breaking up trains, August, 1893	822.00
13395	Engine repairs, August, 1893	312.04
13557	Switching, August, 1893	555.00
13683	Labor & material, track to Sept. 20th	20.55
13700	Breaking up trains to Sept. 20th	572.00
13737	Car repairs, to Sept. 20th	14.03
13738	Engine repairs, to Sept. 20th	183.26
13770	Weighing cars, to Sept. 20th	16.50
13771	Setting cars for transfer, to Sept. 20th	27.50
13775	Switching, to Sept. 20th	552.00
		$8,162.11

"Exhibit A."

(Indorsed:) Filed May 27th, 1895. James T. Jones, clerk.

28 Thon afterwards, to wit: on the eighth day of June, in the year last aforesaid, came the receivers in said consolidated cause and filed in the clerk's office of said court their answer to said intervening petition, which answer is as follows, to wit:

Answer of Receivers to Intervening Petition.

Filed June 8, '95.

In the Circuit Court of the United States for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK
against
THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } In Chancery.

Answer of the receivers herein to the intervening petition of the Terminal Railroad Association of St. Louis.

These receivers, now and at all times hereafter, saving and reserving to themselves all benefit and advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and other imperfections in the said intervening petition contained, for answer thereto, say

That the facts set forth and alleged in said intervening petition may be true for anything they know to the contrary, but that they are utter strangers to all and every such matters, and cannot form any belief concerning the same, and therefore pray strict proof thereof.

And these receivers, further answering, deny that the petitioner is entitled to the relief, or any part thereof, in said intervening petition demanded, and prays the same advantage of this answer, as if they had pleaded or demurred to the said intervening petition.

BLUFORD WILSON,
Solicitor for Receivers.

(Indorsed:) Filed June 8th, 1895. James T. Jones, clerk.

29 Afterwards, to wit: on the sixth day of January, in the year of our Lord one thousand eight hundred and ninety-six, came Stuart Brown, Esq., one of the masters of this court, and filed in the clerk's office of said court, his report on said intervening petition, which report is as follows, to wit:

Report of Master on Intervening Petition.

Filed Jan. 6, '96.

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY.

In the intervening petition of Terminal Railroad Association of St. Louis.

To the Hon. William J. Allen, judge presiding:

Your subscriber, one of the masters in chancery of this honorable court, to whom the above-styled intervention was referred under the general order of reference in the aforesaid cause, would respectfully report, that he has examined the petition and answer in said intervention, taken evidence and heard the argument of counsel, that there is due the said intervenor, Terminal Railroad Association of St. Louis, for labor and materials furnished, the sum of eight thousand one hundred and sixty-two $\frac{1}{100}$ —; that the aforesaid amount is a lien upon the property of the Chicago, Peoria & St. Louis Railway Company prior and superior to the claims of mortgage bondholders, under the order appointing the receivers in this cause, and that it should be paid out of surplus income or from a sale of the property of the said railway company.

All of the evidence taken on said claim is herewith submitted.

All of which is respectfully reported.

STUART BROWN,
Master in Chancery.

(Indorsed:) Filed January 6th, 1896. James T. Jones, clerk.

30 And afterwards, to wit: on the twenty-ninth day of January, in the year last aforesaid, came again the receiver in said consolidated cause, and filed in the clerk's office of said court exceptions to the report of said master, which exceptions are as follows, to wit:

Exceptions of Receiver to Report of Master.

Filed Jan. 29, '96.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY OF NEW York *against* CHICAGO, PEORIA & ST. LOUIS RAILway Company.	Consolidated. In Equity.

Intervening petition of the Terminal Railroad Association of St. Louis.

Exceptions of the receiver to master's report.

Now comes C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway Company, by Bluford Wilson and P. B. Warren, his solicitors, and excepts to the report of the master filed herein on January 6, 1896, and for cause of exception shows to the court as follows:

First. That the said master has found in his said report that there is due to the intervenor, the sum of $8,162.11 for labor and materials furnished the Chicago, Peoria and St. Louis Railway Company, *and* whereas said master should have found that the said sum was due for terminal facilities furnished to the Jacksonville Southeastern line.

Second. That the said master has found in his said report, that the aforesaid amount is a lien upon the property of the Chicago, Peoria and St. Louis Railway Company, prior and superior to the claims of mortgage bondholders under the order appointing the receiver in this cause, and that it should be paid out of the surplus income, or from a sale of the property of the railway company; whereas, the said master should have found that the aforesaid amount is due the said petitioner, but is not a lien upon the
31 property of the railway company, prior or superior to the lien of the mortgage bondholders.

Third. The findings of the said master are unsupported by the evidence.

Fourth. The findings of the said master are contrary to the evidence.

Fifth. The findings of the said master are contrary to the law.

Wherefore this receiver prays that the said report of the master may be vacated and set aside, and that an order may be entered herein dismissing the said intervening petition of the Terminal Railroad Association of St. Louis.

(Indorsed:) Filed January 29th, 1896. James T. Jones, clerk.

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Afterwards, to wit, on the thirtieth day of July, in the June term of said court, in the year last aforesaid, the following proceedings were had in said court, in the matter of said intervening petition, and entered of record, to wit:

Decree on Intervening Petition.

In the Circuit Court of the United States, Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York *vs.* THE CHICAGO, PEORIA & ST. LOUIS RAILway Company *et al.*	In Equity. Consolidated Cause.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

And now on the 30th day of July, A. D. 1896, came again the said intervenor, The Terminal Railroad Association of St. Louis, by Samuel P. Wheeler, its counsel, and the said Mercantile Trust Company of New York, by Bluford Wilson, its counsel, and also C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his counsel, and this cause coming on to be further heard upon the exceptions of the said C. H. Bosworth, receiver, to the report
32 of the master in chancery herein, and the court having heard argument of counsel, and being sufficiently advised, doth order, adjudge and decree that said exceptions be and they are hereby overruled; and this cause coming on to be further heard on the report of the master in chancery filed herein, and it appearing to the court that during the six months next before the appointment of the receiver herein, the said intervenor, The Terminal Railroad Association of St. Louis, performed labor and furnished materials to the Chicago, Peoria and St. Louis Railway Company in the conduct of its business as a carrier of freight and passengers, and that said labor and material *was* reasonably worth eight thousand one hundred and sixty-two dollars and eleven cents ($8,162.11), and that said labor and material *is* embraced in the order appointing the receiver herein to be by him paid as a preferred claim.

It is therefore ordered, adjudged and decreed by the court that the receiver herein pay to the intervenor, The Terminal Railroad Association of St. Louis the said sum of eight thousand one hundred and sixty-two dollars and eleven cents ($8,162.11) out of the income of said receivership, if any such income is in his hands, and in case he has not the funds in hand for this purpose, it is ordered, adjudged and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and until paid the same is hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein.

And afterwards, to wit, on the sixteenth day of November, in the year last aforesaid, came again the receiver in said consolidated cause and filed in the clerk's office of said court, his petition for appeal, assignment of errors and bond on appeal, which are as follows, to wit:

33 *Petition for Appeal.*

Petition of Receiver for Appeal.

Filed Nov. 18, '96.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated. In Equity.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

Petition for appeal.

The petition of C. H. Bosworth, receiver herein, showeth unto your honor that a final decree was rendered in the above-entitled cause on the 30th day of July, 1896.

Whereby it was ordered, adjudged and decreed that your petitioner should pay over to the said Terminal Railroad Association of St. Louis the sum of $8,162.11.

Your petitioner further states to your honor that he has assigned errors upon the record in said cause, specifying errors, as he alleges, in the record and judgment aforesaid. He therefore prays that your honor will grant an appeal from the said judgment and decree, to your petitioner, upon condition that he enters into bond in the sum of $500.00, with surety to be approved by this honorable court, in such time as your honor shall order and decree.

C. H. BOSWORTH, *Receiver*,
By BLUFORD WILSON AND
PHILIP BARTON WARREN,
His Solicitors.

(Indorsed:) Filed November 18th, 1896. James T. Jones, clerk.

34 *Assignment of Errors.*

Filed Nov. 18, '96.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated. In Equity.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

Assignment of errors.

And now comes C. H. Bosworth, receiver herein, by Bluford Wi-son and P. B. Warren, his solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness.

4. The court erred in failing and refusing to order, adjudge and decree that the claim of the intervenor was not entitled to a lien prior to that of the mortgage bondholders on the mortgaged premises of the defendant railway company.

5. The court erred in ordering, adjudging and decreeing the said C. H. Bosworth, as receiver, to pay to the intervening petitioner the sum of $8,162.11, with interest from said date, together with the cost in this case.

35 6. The court erred in ordering, adjudging and decreeing that the said intervenor be paid the sum of $8,162.11 out of the proceeds of the sale of the mortgaged premises of the defendant railway company ahead of the mortgage debt.

Whereby the plaintiff in error prays that the judgment and decree be reversed and annulled.

(Signed) BLUFORD WILSON &
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

(Indorsed:) Filed November 18th, 1896. James T. Jones, clerk.

Bond on Appeal.

Filed Nov. 18, '96.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

Bond.

Know all men by these presents, that we, C. H. Bosworth, as receiver of the Chicago, Peoria and St. Louis Railway Company, as principal, and Bluford Wilson as surety, are held and firmly bound unto the said Terminal Railroad Association of St. Louis in the penal sum of five hundred ($500.00) dollars, for the payment of which, well and truly to be made, the said receiver, as such binds himself and his successor, and the said surety binds himself, his heirs and personal representatives, jointly and severally by these presents.

Dated -his 18th day of November, 1896.

36 The condition of this obligation is such that whereas, on the 30th day of July, 1896, in the circuit court of the United States for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden C. H. Bosworth and Bluford Wilson should pay over to the said Terminal Railroad Association of St. Louis the sum of eight thousand one hundred and sixty-two and eleven one-hundredths dollars ($8,162.11), and from which decree the said receiver has appealed to the United States circuit court of appeals for the seventh circuit, upon the condition that the receiver should enter into bond in the sum of five hundred dollars ($500.00), with surety to be approved by the court.

Now, therefore, if the said receiver shall well and truly, without delay, prosecute the said appeal with effect and shall pay all costs and damages that may be adjudged against him, by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

C. H. BOSWORTH AS RECEIVER, [SEAL.]
As Receiver of the Chicago, Peoria & St. Louis R'y Co.
BLUFORD WILSON. [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

(Indorsed:) Filed November 18th, 1896. James T. Jones, clerk.

Then afterwards, to wit: on the eighteenth day of November, in the June term of said court in the year last aforesaid, the following further proceedings were had in said court in the matter of said intervening petition and entered of record, to wit:

37 *Order Allowing Appeal and Approving Bond.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY *against* CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated. In Equity.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

Order allowing appeal and approving bond.

Now, on this 18th day of November, 1896, the same being one of the days of the June term, A. D. 1896, of this court, come C. H. Bosworth, receiver herein, and files his petition for appeal from the order and decree of the court entered herein on the 30th day of July, 1896; and it appearing to the court that said petition is in due form, it is hereby ordered, adjudged and decreed that the prayer of said petition be, and the same is hereby granted; that the appeal be, and the same is hereby allowed the said C. H. Bosworth, receiver, from said order and decree of July 30th, 1896, to the United States circuit court of appeals for the seventh circuit, upon the said C. H. Bosworth, as such receiver, entering into bond in the sum of $500.00, with surety to be approved by this court; which bond it appears to the court is herewith submitted and approved.

Afterwards, to wit: on the nineteenth day of November, in the year last aforesaid, the following certificate of evidence was filed in the clerk's office of said court, to wit:

38 *Certificate of Evidence.*

Filed Nov. 19, '96.

On the 3rd day of September, 1895, before Stuart Brown, master in chancery, at his office in the city of Springfield, Illinois, in the matter of the intervening petition of the Terminal Railroad Association filed in the cause of "The Mercantile Trust Company of New York *et al.* against Chicago, Peoria & St. Louis Railway Company *et al.*," a consolidated cause now pending in the United States circuit court for the southern district of Illinois, the following testimony was taken, signatures of witnesses being waived by agreement:

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY OF NEW YORK
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY.

Intervening petition of the Terminal Railroad Association.

Mr. T. D. HINCHLIFFS sworn.

Q. Have you the custody and control of the unpaid vouchers of the J. S. E. line up to the appointment of receivers?

A. I have.

Q. Will you please refer to the voucher in favor of the Terminal Railroad Association of St. Louis and state the amount in gross vouchers in favor of this association for services rendered within six months before appointment of receivers?

A. $8,162.11 certified "Exhibit A."

Q. Is this paper shown you and certified by you a correct statement of the account?

A. It is a correct statement of the account payable within six months' rule.

Vouchers submitted to master in chancery for inspection and are all charged against Chicago, Peoria & St. Louis.

September 3rd, 1895.

STUART BROWN, *M. C.*

39 "EXHIBIT A."

Chicago, Peoria & St. Louis railway in account with Terminal Railroad Association of St. Louis.

Statement of Unpaid Bills.

No.	Date sent.	What for.	Amount.
12121	June 2.	Switching cars, April	$528.00
12327	June 9.	Breaking up trains, May	488.50
12403	June 16.	Engine repairs	415.35
12467	June 26.	Switching cars, May	698.50
12684	July 12.	Breaking up trains, June	375.50
12717	July 17.	Car repairs	2.63
12718	July 17.	Engine repairs	388.88
12884	Aug. 1.	Switching cars, June	493.50
13015	Aug. 14.	Breaking up trains	668.00
13023	Aug. 15.	$\frac{1}{15}$ expense joint inspection	37.24
13048	Aug. 19.	Engine repairs	352.41
13146	Aug. 24.	Setting cars for trains, July	5.00
13147	Aug. 24.	Cutting out cars	10.50
13148	Aug. 24.	Weighing cars	6.00
13149	Aug. 25.	Switching cars	599.00
13331	Sept. 9.	Pro expense	12.22

13342	Sept.	9.	Switching coaches, April & July.....	6.00
13363	Sept.	9.	Breaking up trains.....	822.00
13395	Sept.	9.	Engine repairs.....	312.04
13557	Sept.	30.	Switching, August.....	555.00
13683	Oct.	9.	Labor & material, tracks....	20.55
13700	Oct.	16.	Breaking up trains.....	572.00
13737	Oct.	16.	Car repairs.....	14.03
13738	Oct.	16.	Engine repairs.....	183.26
13770	Oct.	16.	Weighing cars...	16.50
13771	Oct.	16.	Setting cars for transfer.....	27.50
13775	Oct.	23.	Switching, September...	552.00
				$8,162.11

I certify these bills to be proper for payment under six months' limitation named in court order.

T. D. HINCHLIFFS, *Auditor.*

September 3rd, 1895.

40 Which said evidence with the exhibits was read on the hearing of said cause, and was all the evidence offered or heard upon the hearing thereof. Forasmuch as said matters do not appear of record, the said receiver, C. H. Bosworth, presents this certificate of evidence, and prays the court that the same may be signed, sealed and made a part of the record in this cause, and it is accordingly done this 19th day of November, 1896.

WILLIAM J. ALLEN, [SEAL.]
Judge of the District Court for the Southern District of Illinois.

(Indorsed:) Filed November 19th, 1896. James T. Jones, clerk

Certificate of Clerk.

UNITED STATES OF AMERICA, *Southern District of Illinois,* } ss:

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of all the papers filed and proceedings thereon had in the matter of the intervening petition of the Terminal Railroad Association of St. Louis, filed in a certain consolidated cause, wherein The Mercantile Trust Company is complainant, and The Chicago, Peoria and St. Louis Railway Company is defendant, as truly and completely as the same appear of file and record in my office.

In witness whereof I have hereunto set my hand and seal of said court at Springfield in said district, this twenty-third day of November, in the year of our Lord one thousand eight hundred and ninety-six, and of our Independence the one hundred and twenty-first year.

[SEAL.] JAMES T. JONES, *Clerk.*

41 October Term, A. D. 1896.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on the fifth day of October, 1896, of the October term, in the year of our Lord one thousand eight hundred and ninety-six, and of our Independence the one hundred and twenty-first year.

And afterwards, to wit, on the second day of December, 1896, in the October term last aforesaid, came the appellant, by his counsel, and filed in the clerk's office of said court his appearance; which said appearance was in the words and figures following, to wit:

United States Circuit — of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner. } No. 367.

The clerk will enter my appearance as counsel for the appellant.
BLUFORD WILSON AND
P. B. WARREN.

NOTE.—Must be signed by a member of the bar of the United States circuit court of appeals for the seventh circuit. Individual and not firm names must be signed.

Endorsed: Filed Dec. 2, 1896. Oliver T. Morton, clerk.

And afterwards, to wit, on the eighth day of March, 1897, in the October term last aforesaid, came the appellee, by its counsel, and filed in the clerk's office of said court its appearance; which said appearance was in the words and figures following, to wit:

42 United States Circuit — of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner. } No. 367.

The clerk will enter my appearance as counsel for the appellee.
SAMUEL P. WHEELER.

NOTE.—Must be signed by a member of the bar of the United States circuit court of appeals. Individual and not firm names must be signed.

Endorsed: Filed March 8, 1897. Oliver T. Morton, clerk.

And afterwards, to wit, on the third day of May, 1897, in the term last aforesaid, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervenor. } 367.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing May 19, 1897.

And afterwards, to wit, on the nineteenth day of May, 1897, in the term last aforesaid, came the appellee, by counsel, and
43 filed in the clerk's office of said court its appearance; which said appearance was in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Int. Petitioner. } No. 367.

The clerk will enter my appearance as counsel for appellee.
M. F. WATTS.

NOTE.—Must be signed by a member of the bar of the United States circuit court of appeals for the seventh circuit. Individual and not firm names must be signed.

Endorsed: Filed May 19, 1897. Oliver T. Morton, clerk.

And afterwards, to wit, on the nineteenth day of May, 1897, in the term last aforesaid, in the record and proceedings thereof in said entitled cause, appears the following entry, to wit:

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervenor. } 367.

Now, this day, came the parties, by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Bluford Wilson and Mr. P. B. Warren, counsel for appellant, and by Mr. Samuel P. Wheeler and Mr. M. F. Watts, counsel for appellee, and the court, having
44 heard the same, takes this matter under advisement.

And afterwards, to wit, on the eighth day of June, 1897, in the term last aforesaid, the court delivered its opinion in said cause; which opinion is in the words and figures following, to wit:

45 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1896, May Session, 1897.

C. H. BOSWORTH, Receiver of the Chicago, Peoria and St. Louis Railway Company, Appellant,
v.
TERMINAL RAILROAD ASSOCIATION OF ST. Louis, Intervening Petitioner.

No. 367. Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Before Woods, Jenkins, and Showalter, circuit judges.

In a suit brought by the Mercantile Trust Company on the 21st day of September, A. D. 1893, to foreclose a mortgage upon the Chicago, Peoria and St. Louis railway, the court appointed a receiver with the authority usually conferred upon receivers in the charge and operation of railways and in the general administration of the estate, and required the receiver to pay (1) all past-due taxes, (2) all current operating expenses, (3) all past-due wages, (4) "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past and all ticket, trackage and traffic balances due from said railroad;" to this last item the Mercantile Trust Company objected, which objection the court overruled.

On the 27th day of May, 1895, The Terminal Railroad Association of St. Louis, the appellee, filed its intervening petition asserting a claim against the railway company amounting to $8,162.11 for switching, engine and car repairs, etc., done within six months prior to the date of the order appointing a receiver and asking for
46 the allowance of the claim as a preferential claim under the order of the court appointing the receiver. An answer was filed to this petition by the receiver asserting that the facts stated might be true for anything known to the contrary, but, being stranger to the matters, he demanded strict proof, and denying that the petitioner was entitled to the relief demanded. The intervening petition under a general order of reference went to the master whose report was to the effect that the claim was a just one and that the amount is a lien upon the property of the railway company prior and superior to the claims of the mortgage bondholders under the order appointing the receiver, and that it should be paid out of the surplus income or from a sale of the property of the railway company. To this report the receiver filed exceptions, not impu-ning the finding of the master that the claim was a just one against the company but to the finding that the claim should be paid from the surplus income or from a sale of the property of the railway company, "whereas," the exception proceeds, "the said master should have found that the aforesaid amount is due the said petitioner but is not a lien upon the property of the

railway company prior or superior to the lien of the mortgage bondholders." Upon hearing the court, on July 30, 1896, overruled the exceptions and entered a decree allowing the claim at the amount stated; and declaring that it was a claim of the character embraced in the order appointing the receiver to be paid as a preferred claim and directing that the receiver pay to the intervenor the amount of the claim "out of the income of said receivership, if any such income is in his hands, and in case he has not the funds in hand for this purpose it is ordered, adjudged and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and until paid the same is hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein." To this decree the receiver assigned error in substance to the effect that the court erred in adjudging that the claim of the intervening petitioner was entitled to priority to the mortgage debt. The receiver thereupon prayed an appeal which was allowed.

JENKINS, circuit judge, delivered the opinion of the court:

The contention of the receiver is thus stated in the brief of his counsel: "The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only con-
47 troversy is as to whether or not the appellee is entitled on its petition and proof made thereunder to have the vested lien of the mortgagee displaced to the extent of his claim." He insists that the provision in the decree appointing a receiver providing for the payment of certain claims as preferential created no vested right, and that within our ruling in *Mather Humane Stock Transportation Company v. Anderson*, 46 U. S. App., 138, the decree in that regard was interlocutory and is not controlling of the subsequent action of the court; and that within the doctrine declared in *Turner v. The Indianapolis, Bloomington and Western Railway Company*, 8 Bissell, 315; *Fosdick v. Schall*, 99 U. S., 235; *Union Trust Company v. Souther*, 107 U. S., 591; *Burnham v. Bowen*, 111 U. S., 776; *Union Trust Company v. Illinois Midland Railway Company*, 117 U. S., 432; *Wood v. Guarantee Trust and Safe Deposit Company*, 128 U. S., 416; *Kneeland v. American Loan and Trust Company*, 138 U. S., 89; *Thomas v. Western Car Company*, 149 U. S., 111; *Farmers' Loan and Trust Company v. Green Bay, W. & St. P. Railway Company*, 45 F. R., 664, before a claim can be deemed to be preferential to the mortgage debt, there must be first established a diversion of income from the payment of operating expenses to the payment of interest and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming at the request of a trustee the operation of a railway, has not the right to provide for the payment out of the income or the corpus of the road, of operating expenses incurred within a limited time prior to the suit,

unless there has been diversion of income and then only to the extent of such diversion.

It is, however, objected by the appellee that with this question the receiver is not concerned and that, the justice of the debt being conceded, it is none of his affair that it is preferred by the decree to the mortgage debt. This contention, we think, must be sustained. While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all parties in interest. His duty is to defend the estate against all claims which he deems to be unjust; his duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled; he represents the estate, with right to sue to recover demands due to it; with right to defend it against claims asserted. In this respect we concur with the circuit court of appeals for the fourth circuit that this duty carries with it the right and the duty, in case of doubtful claim, to take the judgment of the court of last resort. *Thom v. Pittard*, 8 U. S. App., 597. This right and duty should, however, be limited in its exercise to those cases in which the es-
48 tate, as a whole, is interested to enforce a right or to defend against a claim asserted. In respect to many matters, the receiver has no right of appeal, while in respect to others, his right to appeal may not be gainsayed. Thus, he may rightfully appeal from a decree refusing him compensation, or disallowing his accounts, or establishing a claim against the estate or denying a claim asserted for the estate. He has no right to appeal from a decree removing him from his position, for that is matter of discretion with the court appointing him and he holds his position by the sufferance of the court; nor has he the right of appeal from a decree authorizing an issue of receivers' certificates, or directing a particular management of the trust property, or directing sale of the mortgaged property or confirming its sale, or directing the turning over of property in his hands; for he is neither the censor of the court nor interested in the event. Illustrations might be multiplied. The true line of demarcation, we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate; he has the right of appeal from any decree which affects his personal right for therein he has an interest; but he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another. *Security Trust Company v. Sullivan*, 45 U. S. App., 601, 603.

The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from, the railway had been sold under decree of sale and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand moneys with which

to pay the debt adjudged. That this debt was a just claim against the estate is not doubted and is conceded. No objection is taken to its allowance, nor is it questioned that under the decree appointing the receiver it was a proper claim to be paid in preference to the mortgage; but the receiver asserts that the decree allowing preferential claims was improvident and that the mortgage had preference in payment because there had been in fact no diversion of income to the payment of interest. Neither the trustee, nor the bondholders, nor the purchaser is here objecting. Who made the receiver the guardian of their interests in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to a common fund;
and this, whether the estate remains in his custody or has passed
49 from his possession and control under decree and sale? By what right does he become the partisan advocate when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what authority may he assert the rights of a purchaser? By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it? He has no such right. He is in so doing an interloper obtruding himself in breach of his duty where he has no right, and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has not right to interfere.

It was held in *Farlow v. Kelley*, 131 U. S. Appendix, CCI. that the allowance by a circuit court of an appeal taken by a receiver is equivalent to leave by the court to the receiver to take an appeal, and it is urged that since the appeal here was allowed by the circuit court according to usual practice, we are bound to entertain it and to determine the question which the receiver has presented. In some States it is held that no case may be appealed by a receiver without permission, notwithstanding parties may appeal as of right and without leave. The Supreme Court, in the case referred to, merely holds that if leave were essential it was granted by the usual allowance of an appeal; but it is nowhere held, and the doctrine cannot be sanctioned, that the allowance of an appeal can operate to clothe the receiver with an interest which he has not, or can impose upon an appellate court the duty of hearing and determining a moot question.

The appeal will be dismissed.

50 And afterwards, on the same day, to wit, on the eighth day of June, 1897, in the term last aforesaid, in the record and proceedings thereof in said entitled cause appears the following entry, to wit:

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervenor. } 367.

Appeal from the circuit court of the United States for the southern district of Illinois.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Illinois and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that this cause be, and the same is hereby, dismissed with costs.

And afterwards, to wit, on the twenty-fifth day of June, 1897, in the term last aforesaid, came the appellant, by his counsel, and filed in the clerk's office of said court his petition for a rehearing; which petition was in the words and figures following, to wit:

51 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

C. H. BOSWORTH, Receiver, Chicago, Peoria & St. Louis Railway, Appellant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner, Appellee. } No. 367.

Petition for Rehearing.

Bluford Wilson, Philip Barton Warren, solicitors for petitioner.

Filed Jun- 25, 1897.

OLIVER T. MORTON, *Clerk.*

52 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

C. H. BOSWORTH, Receiver Chicago, Peoria & St. Louis Railway, Appellant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner, Appellee. } No. 367.

Petition for Rehearing.

Now comes the appellant and prays that a rehearing be granted in this cause, and that the decision of this court filed herein on the 7th day of June, 1897, and any order to be entered thereon dismissing the appeal, may be set aside, and that an order may be entered reversing said decision and granting to this petitioner the relief herein prayed.

53 For grounds of this petition, appellant submits the following:

POINT I.

This court misapprehended a most material fact.

In its opinion at page 2, the court says:

"The contention of the receiver is thus stated in the brief of his counsel: 'The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled on its petition and proof made thereunder to have the vested lien of the mortgagee displaced to the extent of his claim.'"

(*a.*) It was not intended to concede the demand to be a just claim against the estate.

The court has correctly stated the contention of the receiver, but we submit it has drawn from the language used by his counsel an erroneous conclusion, viz: (Opinion, page 4):

"That this debt was a just claim *against the estate* is not doubted *and is conceded.*

The distinction between the concession made by the receiver and the conclusion drawn by the court is vital, in the determination of the receiver's right to appeal. The receiver admits the claim
54 to be just as against the *railway company*, but *expressly denies* it to be just as *against the estate* in his hands for conservation.

We would find no difficulty in agreeing with the conclusion of the court that the receiver had no interest in the appeal, if we conceded that debt to be a just claim against the estate, for then clearly it would be a matter of indifference to him how it was satisfied. But the concession of the receiver is that as against the railway company only, and not against the estate, is the claim just.

(*b.*) The conclusion of the court is based on this supposed concession.

The above fact is apparent from the language used throughout the opinion of the court. At the very beginning of the discussion of this question (Opinion, p. 3) it says of the receiver that—

"His duty is to *defend the estate against all claims* which he deems to be unjust; his duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled; he represents the estate, with right to sue to recover demands due to it; *with right to defend it against claims asserted.*"

And again (Opinion, page 4) the court says:

"The true line of demarcation, we think to be this: He has the right of appeal with respect to any *claim asserted* by or *against the estate*, for therein he is the representative of the entire estate."

55 Having thus announced his duty to defend the estate against all claims, and his right to appeal with respect to any claim asserted against the estate, the court bases its conclusion that in this particular instance the receiver was not in the line of his duty, nor had the right of appeal, on the premise that the receiver, by admitting the claim to be just against *the railway company*, thereby conceded it to be just as *against the estate.*

That such conclusion is based upon that misapprehended concession is clearly shown by this language (Opinion, p. 4):

"*That the debt was a just claim against the estate is not doubted, and is conceded. No objection is taken to its allowance*, nor is it questioned that under the decree appointing the receiver it is a proper claim to be paid in preference to the mortgage."

That the demand of the Terminal Railroad Association is a claim *asserted solely* against the estate is a fact that cannot be seriously denied, and as it is necessary to discuss the same under a subsequent point, we will not repeat it here.

56 POINT II.

The receiver is appointed to protect the estate for whomsoever may be ultimately entitled thereto.

The interest a receiver has in the estate for which he is appointed in railway foreclosures was declared in the early case of *Fosdick vs. Schall*, 99 *U. S.*, 235, where the Supreme Court said:

"He holds, pending the litigation, for the benefit of whomsoever *in the end* it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place."

Again in *Booth vs. Clark*, 17 *Howard*, 322, it is said:

"He is appointed for the benefit of all parties who may establish rights in the cause."

(a.) Presumptively the mortgagee is entitled to the estate.

It is not to be overlooked that this receiver was appointed on a bill filed by the mortgagee to foreclose this estate, and that therefore there is a great distinction between cases of this kind and cases where a receiver is appointed in proceedings to wind up the general affairs of a corporation or to dissolve a partnership. In the latter cases a court takes possession of the property for the very
57 purpose of dividing it between all classes of creditors, while in cases for the foreclosure of a mortgage the court takes possession of the property to apply it to the payment of the mortgage creditor, if such mortgagee proves the allegations of its bill. The very fact that a court will, on the application of the mortgagee, take possession of the estate, is conclusive of the *prima facie* case thus made by the complainant. So that primarily the court holds the property to satisfy the debt of the mortgagee, and as between the mortgagee and an unsecured creditor the presumption is that the former is entitled to the estate which the receiver is conserving.

(*b.*) By intervening an unsecured creditor does not establish a right in the cause.

In *Booth vs. Clark, supra*, it was said the receiver represents all parties who establish rights in the cause, but we submit that the entry of a decree in the lower court making intervenor's claim a prior lien, unless unappealed from, does not finally establish a right in the cause. And we therefore contend that the receiver is in no way the representative of an intervenor until the decree of the lower court has been affirmed or remains unappealed from.

This distinction has been clearly recognized by this court in the case of *McLeod vs. City of New Albany*, 66 *Fed. Rep.*, 378, where, in determining the matter presented on appeal, it was necessary
58 for the court to define who a receiver represented in respect to the conservation of the property for which he was appointed. There the court held, at page 381, *not that he represented every party* who might come into the original cause *by intervention*, but that he represented all parties to the *original bill*.

POINT III.

Appellee attempts to diminish the estate which appellant is to conserve.

Again calling the court's attention to the fact that appellant has always resisted appellee's claim *as against the estate*, we respectfully submit that in carrying that resistance to the court of last resort he does not make himself a partisan as between the real parties to the issue before the court in the cause in which he was appointed, viz: the foreclosure of a certain mortgage; but that he is doing all in his power to conserve the estate for whomsoever shall be ultimately entitled to it, and that thereby he is doing what was expressly approved by this court in *McLeod vs. City of New Albany*, 66 *Fed. Rep.*, 378, viz: to contest the right of the stranger to participate in this estate and thus diminish it.

59 (*a.*) His duty is to defend the estate against all claims which he deems to be unjust.

In the opinion rendered by the court in the case at bar it is said of the receiver that

"His duty is to *defend the estate* against all claims which he deems to be unjust."

In this case the receiver admits that there is no defense to the claim as against the railway company, *but that as against the estate* he deems it to be unjust and that there is a good and valid defense to it. In interposing that defense and carrying it to the court of last resort is he not performing the very duty which this court assigns to him?

(*b.*) This duty has been announced and recognized repeatedly by this court.

In *McLeod vs. City of New Albany*, 66 *Fed. Rep.*, 378, a case abso-

lutely on "all fours" with this case, this court announced most emphatically, not only that it was the duty of the receiver to preserve the estate, but that on an appeal from a decree of the lower court adjudging the claim of an unsecured creditor to be prior to that of the vested mortgage lien, the receiver could not object that the original parties to the foreclosure cause were not parties to the appellate proceeding, *because he, the receiver, represented them,*
60 in this appellate court *for the purpose* of contesting the claim of an unsecured creditor to displace their vested lien, and further, because they were not objecting that they were not *well* represented.

We earnestly urge that this court will seriously consider the McLeod case, and take the liberty of here presenting an abstract of the facts, which make it identical with the case at bar, for the purpose of showing that the conclusions reached by the same court in this case conflicts therewith.

In the McLeod case, McLeod was appointed receiver of the property of the Kentucky and Indiana Bridge Company in a suit brought against it and the trustees of its mortgage, by the Youngstown Bridge Company. In this suit *an unsecured creditor*, the city of New Albany, filed its intervening petition for the payment of taxes *accrued prior to the receivership*, and prayed that the same be paid out of the funds in the hands of the receiver *prior* to the claim of *any other creditor.*

This intervention was referred to a master in chancery, who reported in favor of the unsecured creditor. The receiver excepted to this report but his exceptions were overruled, the master's report confirmed, and the lower court entered a decree directing the receiver to pay the amount found due. From this the receiver appealed to this the seventh circuit court of appeals.

61 Among other errors assigned was a defect of proper parties. The receiver urged not only that the mortgagee should have been made a party, but also all of the parties to the *original* suit. This contention presented fairly and squarely the question as to whether or not the receiver had sufficient interest, in a controversy between various creditors, claiming priority over each other, out of the estate for which he was appointed to conserve, to present the matter for final determination to the court of last resort; or whether or not it was necessary that the particular party whose lien was sought to be displaced should have been made a formal party to the intervening petition in the lower court, and have appealed from its decision, if the same displaced its lien. And in that case this court *decided that very question*, and not only held that it was the duty of the receiver to resist the payment of the taxes out of the estate which he was appointed to conserve, but went further and held that the receiver had sufficient interest in the matter *to fully represent on appeal the parties to the original cause*, whose vested lien the intervenor was attempting to displace.

The language used by the court in arriving at the above conclusions (page 381) is:

"The other parties whose presence is suggested as essential *are*

parties to the original bill as holding incumbrances upon the property subordinate to the lien of the complainant. They were in
62 court in the suit in which the receivers were appointed, and were bound to take notice of the intervening petition of the city filed in that suit, and of the proceedings thereunder. It was not necessary that they should be made formal parties to the petition. Being parties to the suit, they were, in fact, parties to the intervening petition. The receivers in respect to the conservation of this property *represent all parties to the original bill.* It was their duty to preserve the estate and thereto to pay the taxes thereon. If the taxes were illegally laid, it was their duty, representing all in interest, to contest payment. If parties to the original bill desired to take active part in such contest they had a right to be heard, and such right, if demanded, would doubtless have been accorded to them. They did not so ask, although being parties to the suit they were obligated to take notice of the proceedings. *They are not here objecting that they were not well represented by the receivers.* The latter cannot for the first time, after full hearing upon the merits before the master, object *that those they represented* should be formally notified of the petition."

If, therefore, as this court above holds, *that a receiver cannot object* that the parties whose lien the intervenor seeks to postpone is not a *formal* party, upon what principle of justice *can the intervenor* set up such a purely technical defense; if this court will not sustain the contention that the receiver does not represent all the parties to the original bill, *when made by the receiver*, why will it sustain the same contention *when made by an unsecured creditor?*

Can it be said that the claim of the city of New Albany for taxes in the McLeod case, differs in character from the claim of the Terminal Railroad Association in the case at bar, for material furnished? Both are unsecured creditors whose demands ac-
63 crued prior to the receivership, and the intervening petitions of both pray a priority over the vested contract lien of the mortgagee, and seek payment of the same out of the estate in the hands of the receivers. Or is there such a difference even in degree, which would sustain the vital distinction that in the first case the receiver has sufficient interest in the estate to warrant his appealing from a decree which would diminish that estate, *and in so appealing he represents all of the parties to the original bill*, while in the latter case he has neither the interest nor represents the parties to the original bill, who claim to be ultimately entitled to the estate he was appointed to protect?

We now beg respectfully to direct the court's attention to a number of cases in which this court has clearly recognized and sanctioned this very receiver's right to appeal from an order of the lower court, which diminished the estate he was appointed to protect, *and which declared "the respective equities of parties to the suit," as that term is applied in the opinion in this case.*

Mather Humane Transportation Co. vs. Anderson, 76 *Fed. Rep.*, 164, arose in this very foreclosure suit; the lower court entered a decree disallowing intervenor a priority over the mortgage lien for car

rentals ; from this decree intervenor appealed to this court *making only the receiver appellee.* In disposing of the case this court
64 permitted the receivers to resist intervenor's right to priority and sustained their contention in that regard. *No other parties were before the court.*

Hook vs. Bosworth, 64 *Fed. Rep.*, 443, was also a controversy which grew out of this same foreclosure proceeding. In that case Mr. Justice Jenkins, speaking for the court even went so far as to hold that Bosworth represented *solely* the trustee of the bondholders in a litigation which sought to subject certain earnings of the defendant railway company which accrued prior to the appointment of the receiver to the lien of the mortgagee. In view of the fact that the receiver there contended that he not only represented the bondholders, but also the general creditors of the company, this holding becomes more significant, inasmuch as the court, to prevent the recovery of those prior earnings by the receiver, based its conclusion that the receiver represented *only the trustee*, on the fact that he did not represent the general or unsecured creditors ; and so in the very beginning of the litigation arising out of this foreclosure, this court emphatically and unqualifiedly indicated to this receiver that he represented the trustee of the bondholders, and no one else.

The court may remember that there, William S. Hook and Marcus Hook, as officers of the railway company, after the receiver had been appointed, collected moneys from the Federal Government for the transportation of mails by the railway company. The
65 receiver conceiving himself to represent both the secured and unsecured creditors, and the money to be a part of the estate for which he was appointed to conserve, filed a petition against the Hooks to recover the same. The lower court sustained the receiver's position, but was reversed by this court on the theory that the receiver represented solely the trustee, as is shown by the following language from the opinion at page 449 :

"So that the complainant trustee, *or the receivers as its representatives* have no right to the earnings prior to the filing of this bill. * * * What right the receivers would have to the fund earned prior to the filing of the bill, *if they represented judgment creditors*, we do not find it necessary to determine. As we have before observed, the record discloses that certain intervening petitions, cross-petitions and bills (some of them filed in the cause of The Mercantile Trust Company against The St. Louis & Chicago Railway Company, of the nature of which suit we are not informed) were ordered to be consolidated with the principal cause for the foreclosure of the trust deed or mortgage. The record is wholly silent with respect to the nature of those petitions, cross-petitions and bills, and to the character which the petitioners, cross-petitioners and complainants therein assumed. We are only told that those proceedings, whatever they were, were consolidated with the principal suit. * * * *We are, therefore, unable to say that the appellees (receivers) represent creditors as well as the trustees.* We cannot, therefore, adopt the suggestion of counsel that these intervening petitions, etc., represent

'labor, supply and traffic balance creditors.' The fact does not appear from the record. We cannot assume it.

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It would seem inequitable, under such circumstances, that they should be called upon to respond to the receivers for the amount so paid, *unless possibly* it might be claimed that *they had no right*, after
the appointment of receivers, to receive or to so disburse the
66 monies *as against representatives of creditors*, appropriating it wholly to the payment of debts of their selection, when the debts discharged had only right to share ratably with other indebtedness of the corporation. *We are*, however, from this record, *unable to regard these receivers as representatives of others than the trustee of the mortgage*, who is not entitled to the earnings prior to the receivership."

Can it be said that the position in which this court thus placed the receiver at the beginning of the litigation which arose out of this foreclosure, is in harmony with the position it assigns to him in the case at bar? If not, can it be said that circumstances have arisen which warrant such a radical change? We respectfully submit that as far as the conditions appear from this record they are identical in every detail as those which were disclosed by the record in *Hook vs. Bosworth, supra*, and although the court may personally know that a sale and transfer of the property has taken place, we submit that this case should be decided on the record just as *Hook vs. Bosworth* was. There the court said it would not take the suggestion of counsel as to any fact which did not appear in the record—that it could not "assume it." And for the reason that certain facts did not appear in the record, it there held the receiver to represent solely the mortgagee.

Another case in which this court recognized and sanctioned the receiver's right to resist to the court of last resort, the effort of an unsecured creditor to displace the vested lien of the mortgagee, is
Bosworth vs. National Bank, 64 Fed. Rep., 615. In that case
67 the bank filed its intervening petition in the foreclosure cause, alleging an indebtedness to it by the railway company of $10,000, upon which $2,500 had been paid in cash, and the balance by two drafts drawn on a traffic balance due from another railroad; that the payment of these drafts had been stopped by the receiver; and thereupon prayed an order directing the receiver to pay the same. The court says:

"The claim on the part of the bank is that the drawing of the drafts constituted an appropriation in equity to that extent of the said fund in the hands of the drawee, which gave the bank a lien thereon *pro tanto* in *preference to other creditors*, although said drafts were never accepted or paid by the drawee."

So it is, therefore, to be seen that in that case also, we have a stranger to the original bill intervening in the cause, and claiming the right to have his debts paid out of the estate in the hands of the receiver, ahead of all other creditors. The receiver, while not questioning the validity of the debt as against the railway company,

considered it his duty to resist the payment out of the estate in his hands. His position is thus stated by the court:

"The contention on the part of the receivers is that, inasmuch as the drafts were not presented or accepted, or the money paid before the railway went into the hands of receivers, and the money was then paid over to the receivers on demand, no lien attached to the money in the hands of the drawee, and that the receivers hold it as trustees for the benefit of the railway company and its general creditors."

68 The circuit court sustained the contention of the bank, viz., that it had a lien prior to all other creditors, and directed the receivers to pay it $7,500 out of the estate in their hands. Was not this a decree distributing the assets of the insolvent corporation between conflicting creditors and giving one a right prior to all others? Yet from this decree the receivers appealed, and this court not only sustained the appeal, but went further and maintained the position that the receivers represented the bondholders, the railway company and all other creditors *as against this particular creditor*, and reversed the decree of the lower court, directing it to enter one in favor of the receivers. The court says (page 618):

"The receivers stand in the place of the administrator in the Massachusetts case, *and represent not only* an insolvent debtor, but *all* of its creditors as well, whose rights attached to the fund upon their appointment, and before any appropriation of the portion thereof represented by the drafts had been effected by presentation or acceptance, and even before the fund became due and payable by agreement of the railway companies."

So it appears from these two decisions of this court (*Hook vs. Bosworth* and *Bosworth vs. Bank*) that *it is immaterial whether a receiver represents only the mortgage trustee or all creditors, secured or unsecured, and that in either event it is his right and duty* for the preservation of the estate in his hands for whomsoever may be ultimately entitled thereto *to resist the diminishing of that estate* by the payment to a general creditor in priority over all other creditors.

69 Passing now to the next case in which this court has recognized and sanctioned this receiver's right to appeal from an order of the court appointing him, which directs the distribution of the assets of the insolvent corporation, we come to *Bosworth vs. Francis Hook*. The opinion in this case was handed down in January, 1897, and not yet reported. In that case Francis Hook filed her intervening petition in the original foreclosure cause, alleging that the receivers had taken possession of one hundred gondola cars, upon which she had a lien prior to all other creditors, securing the payment of a promisory note of the railway company for $11,070 held by her. The petitioner prayed the payment of this amount out of the estate in the hands of the receiver, or in default, for the surrender of these particular cars, which were also in the hands of the receiver.

On these facts we again submit that that case also was an attempt on the part of one creditor to obtain a priority over other creditors of the estate, and that when the circuit court entered its decree di-

recting the receiver to pay the intervenor the amount in question out of the funds in his hands, within a specified time, that such was a "decree declaring the respective equities of the parties to the suit," *not the parties to the original suit*, but parties to the suit *as that term is used and applied in the opinion (p. 4) of the court in the present case.* Again in that case, the receiver felt it was his duty to take the judgment of the court of last resort, and so he prayed and perfected an appeal from the order which thus diminished the estate and directed him to part with a portion of it.

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Did this court in that case say to the receiver that he had no right to appeal from that order; that he was as much a representative of Francis Hook as of the mortgagee; that he should, as between these two parties, be indifferent and not a partisan; that his duty was to all in common, that he should not become the advocate of one against the other? No such position was there taken by the court; but, on the contrary, this court again not only sanctioned the receiver's appeal, *but upon it alone*, reversed the lower court and directed it to enter a decree dismissing the intervening petition.

The only response which we can possibly anticipate to these repeated approvals of the receiver's right to appeal is, that in none of those cases was the question directly raised by opposing counsel. This is true, but it must not be overlooked that such a question is one that goes to the very foundation of the jurisdiction of the court of appeals to hear and determine the controversy—questions of which character the courts invariably raise *sui sponte*. But it is also true that the question was not directly raised in this case, as it should have been, by motion to dismiss, before the matter was submitted on its merits.

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If this right to appeal had not been declared by other courts, we submit that its recognition by this court in all the litigation which has heretofore grown out of this particular foreclosure proceeding is full justification of the continuance of that practice by this receiver under the advice of his counsel.

(c.) Is not the demand of an unsecured creditor for priority just as much a claim asserted against the whole estate as one growing out of the negligence of receiver?

In distinguishing this case from *Thom vs. Pittard*, 8 *U. S. App.*, 597, the court in its opinion (p. 3) says:

"This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend a claim asserted."

That was a case in which an employee of the receiver sued him for a personal injury and recovered a judgment, from which the receiver appealed. The argument against the right to appeal in that case is identical with the argument of opposing counsel in this case. We submit that in attempting to compel the receiver to respond in damages for the injuries sustained, *the employee was not asserting a demand which was in any sense more* against the whole estate, than an intervenor who seeks to have his unsecured debt paid

out of the estate in the hands of a receiver. *Prima facie*, that estate, both the *res* and the income, belong to the mortgagee, and
72 any decree or judgment which directs the receiver to pay money out of it diminishes it to that extent, and the estate, as a whole, is just as much interested in defending against one claim as against the other.

The claimants in both instances are strangers to the original litigation and both seek to diminish, to the extent of their claims, the subject-matter of the original controversy. If it is not necessary for the parties to the original controversy to appeal from the demand of one, upon what theory should they be compelled to appeal from the demand of the other? Both are seeking to participate in the estate which the receiver has undertaken to preserve for the application of the decree which shall be entered on the determination of the issues made between the parties to the original bill, *not on any issue which may be raised by the claim of some stranger to participate in the estate.*

Point IV.

The court appointing the receiver made him the guardian of the interests of whomsoever should be ultimately entitled to the estate.

At page 4 of its opinion this court says that neither the trustee bondholders nor purchasers are in court objecting, and therefore asks who made the receiver guardian of their interests. Our
73 reply is that when the bondholders, through their trustees, filed their bill to foreclose a certain mortgage, they represented to the circuit court, that by virtue of a certain contract they were entitled to have all of the property of the railway company sold to pay their certain indebtedness. The issues raised by this claim could not be determined at once, and for the purpose of preserving that property, so that if the court found the issues for the bondholders, this property would be in its possession to sell for their benefit, and so that also if the court found the claim of the bondholders was not sustained, it could restore the property to the company. It was therefore that the court entered an order directing the receiver to take possession of this property and, *primarily*, to preserve it for whomsoever should be ultimately entitled to it, as would follow from a determination of the issues raised on the bill and answer.

(*a.*) In appealing from an order which diminishes the estate the receiver is not necessarily solely asserting the right of one creditor over another.

The theory upon which this receiver has appealed in this case, and in all of the cases arising out of this foreclosure above referred to, is that it was his duty to preserve the estate as against all strangers to the *original controversy*, and that as to the equity of any decree which was entered on an intervening petition directing
74 him to part with a portion of that estate, he should have the judgment of the court of last resort. As to any controversy

between the parties to the original bill he had no interest; *but as to a controversy between a stranger to the cause and the estate*, he had a well-defined interest, and was in duty bound to resist to the utmost the assertion of any claim which would diminish that estate. And we earnestly contend that the fact that the stranger, attempting to get possession of a portion of the estate, happens to be an unsecured creditor, and bases his demand on some equity supposed to be prior to that of the original parties, does not necessarily make the action of the receiver, in defending the estate, the assertion of the right of one creditor over another.

(*b.*) He is simply asserting the right of the estate not to be subject to the demand made against it.

When the receiver appeals from an order which subjects the estate to the satisfaction of any demand, we submit that the manifest weight of authority is conclusive that he comes to this court as the representative of no particular party, *but of the estate*, and in asking the judgment of this court he is asserting the right *not of a party*, but of the estate for the benefit of whomsoever may be ultimately entitled thereto.

This position is adopted by this court when it says of him (Opinion, p. 4) that:

"He has the right to appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate."

75 If this is so, then upon what ground is this appeal dismissed? Is it upon the ground that the demand of the intervenor is not a claim against the estate?

(*c.*) The claim of appellee is one asserted solely against the estate.

Can it be seriously considered for one moment that the claim of the Terminal Railroad Association is not one which is asserted against this estate, and *asserted solely against the estate?* In the intervening petition no relief is prayed against the railway company; no relief is prayed against the bondholders, nor the trustee, nor any other creditor; *but the form and substance of the demand is against the estate solely.* The intervening petition seeks no priority over other creditors; it simply asks the court to give it a portion of the estate *and ignores all parties.* (R., p. 26.)

POINT V.

This right to appeal is announced by the two leading text-writers on receivers.

At section 264 *of High on Receivers*, a text-writer who for years has been recognized by the courts of this country as eminent authority on that subject, we find the following:

"It is held in actions against receivers in their official capacity that they cannot, either expressly or impliedly, waive any legal or

equitable defense on which their principal might have relied
76 had the action been brought against him. Receivers of an insurance company, cannot, therefore, in an action brought against them to recover upon a policy of insurance issued by the company, waive or dispense with the conditions of the policy as to notice of loss. And although leave may be granted to sue a receiver, he is at liberty to assert any defense which he may have to the action, either by plea, answer or demurrer, *and he has the same right to appeal from an adverse judgment for the recovery of funds pertaining to his receivership*, as the party over whom he was appointed would have had."

On this same subject we find that *Beach*, the other well-recognized authority on receivers, at *section 716*, says:

"Every claim presented against a fund in the hands of a receiver, if contested before the court, *becomes in effect a suit against the receiver*, which is ended by final judgment allowing or rejecting the claim, and any party to the contest dissatisfied with the result, may have the proceedings reviewed on appeal. *The receiver, as a party defendant to the action, has the same right to appeal from a judgment of the court affecting the interests of the estate represented by him*, that the party or corporation to whom the estate originally belonged would have had if the suit had been brought against them."

(a.) An appeal by a receiver may be a meritorious rather than a censurable act.

High on Receivers, at section 207, says:

"It is important to observe that the general doctrine of courts of equity, recognizing a receiver as the officer or representative of the court from which he derives his appointment, *is not to be understood as limiting or restricting his rights in the management of a suit which he has once undertaken.* And after entering upon the litigation, he is regarded as being entitled to all the freedom of action of any other person, *and the fact that he appeals from a decision which is adverse to him is not of itself evidence of bad faith, or mismanagement of his trust, and may be a meritorious rather than a censurable act.*"

77 POINT VI.

This action should be determined upon the record.

In its opinion at page 4 the court assumes that the estate has passed out of the hands of the receiver since this intervening petition was filed, as it says:

"The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from the railway had been sold under decree of sale, and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand any moneys with which to pay the debt adjudged."

We are unable to say how much the conclusion of the court is

based upon the foregoing assumption of facts which do not appear of record. But it is safe to say that this court would not have inserted the same in its opinion, if it in no way affected its conclusion. We, therefore, feel justified in calling attention to the well-settled principle that a court of review in determining any question presented to it will confine itself strictly to the record before it. It is true that those matters were admitted by counsel at the argument, but this court in *Hook vs. Bosworth, supra*, said that although counsel suggested certain facts, yet nevertheless, as they did not appear
of record, it could not *assume them to be facts.*

78 Again, all of these facts assumed by this court must have occurred subsequent to the filing of the intervening petition, and this court has held in *Empire Distilling Company vs. McNulta*, 77 *Fed. Rep.*, 700, that while a petition of intervention need not be as formal as a bill of complaint, yet it should contain all the material facts relied on, and embodying by recital or reference, so much of the record in the original suit as is essential; and that proceedings taken in that original suit after the filing of the petition which would fortify the right of the intervenor, should be incorporated in the petition by amendment, *and if this is not done such proceedings cannot be noticed by an appellate court* inasmuch as those subsequent proceedings are not properly brought before it on appeal.

The justice of this is at once apparent, for when the subsequent proceedings are made a part of the record, and one party asserts its intention of relying thereon, the other party has an opportunity of meeting in a formal and orderly manner the contentions asserted by the opposing party on account of said subsequent proceedings.

The conclusion which, it is apparent, the court has based upon this premise of facts, not disclosed by the record, is found in the following language (Op., p. 5):

"By what authority may he assert the rights of a purchaser? *By what right does he undertake to prevent the enforcement of this claim against the purchased estate,* presumably by the decree of sale,

79 charged as a lien upon it? He has no such right. He is, in so doing, an interloper, obtruding himself in breach of his duty where he has no right, and in a matter in which he is not concerned, and to sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has not the right to interfere."

We submit that this conclusion of the court can be based upon no other premise than the assumption of facts not in this record, viz: *that the only interested party is the purchaser at the foreclosure sale.*

Point VII.

The decisions of the State courts, cited by appellee denying right of appeal, are based on facts not found in this record.

We earnestly request the court to examine the facts in the cases which appellee has cited in support of the proposition that a receiver

has not the right of appeal. We have made a brief abstract of those cases for the purpose of showing that the conclusions reached by those courts are based on a condition of affairs wholly different from that disclosed by the record in this case; and for that reason submit that the quotations from the opinions, set out in opposing counsel's brief, have no application to the case at bar.

The court will find, not only that the proceedings, in which
80 those receivers were appointed, were for the dissolution of corporations and the winding up of the affairs of individuals, partnerships and lunatics, but that the receivers were appointed for the express purpose of conserving the estate for the benefit of *all* creditors, secured and unsecured, and for the distribution of such estate between them, *pro rata*.

The court will also find that in two of the citations the receiver's appeal was dismissed on the ground that *he was attempting to offset a claim of his own against the trust estate*, and that the quotation from *Thompson on Corporations*, in which he so positively asserts that receivers have no right of appeal in matters concerning the distribution of the estate, *is based solely on those two cases*.

In *Herrick vs. Miller*, 123 *Ind.*, 305, it appears that Herrick was appointed receiver after a decree of sale had been entered in a suit to foreclose a real-estate mortgage. He was appointed for the express purpose of receiving the rents and profits pending the sale and during the year of redemption. The receiver reported to the court that up to the date of sale the rents collected amounted to $17.23, claiming credits for $12.40. The court refused to approve this report and the receiver then filed another showing in addition, rents collected during the year for redemption to be $92.12. Miller, the complainant in the foreclosure, filed a motion for an order on the receiver to pay the amount over to him. The receiver
81 resisted this motion on the ground that he had bought the property after the foreclosure, and was therefore entitled to the profits earned by the land during the year for redemption. The court sustained the motion of Miller and required the receiver to pay over the money. From this the receiver appealed. The real ground upon which that appeal was dismissed is found in the following language of the court:

"When ordered to pay the money to any particular person he will not be allowed to offset a claim due to him personally, since to allow this would render the disposition of the money as uncertain as before the receiver's appointment, and would defeat the very object of his appointment."

In that case there was no question as to the priority of rival creditors, of an insolvent to the estate; the real question was whether a receiver could become a purchaser of property pertaining to his trust, and could offset his claim in that behalf against complainant. Everything said by the court not necessary to that determination is *obiter dicta*.

Stanton vs. Andrews, 18 *Ill. App.*, 552, originated in an intervention filed by Andrews in a creditors' suit. It appeared that all the funds that could be realized from the insolvent judgment debtor

had been distributed in pursuance of a stipulation entered into by all the parties interested.

The claim of Andrews was for royalties accruing on work finished by the receiver. The receiver joined issue and on hearing
82 the master found in favor of the petitioner, but his report was overruled by the court, on the sole ground that petitioner should have sued at law instead of intervening in the creditors' suit. From this decree the intervenor appealed and in reversing the lower court, the supreme court not only sustained the remedy pursued, but also affirmed the claim.

It was then, after the petitioner's right to the amount claimed had been sustained by the higher court, and by agreement of all creditors and parties in interest, a sum had been set apart for satisfying the claim, that the receiver refused to pay it.

The only ground upon which the receiver based his right to contest the allowance was, an order which the lower court entered while the case was pending on the first appeal, setting aside a certain sum to satisfy petitioner's claim, and *providing that the receiver should retain the residue, if any, as additional compensation for his services.*

The court says:

"It is apparent to us that this action on his part is dictated by that provision of the order of January 4th, 1886, which constructively *gave the receiver a contingent interest* in the sixteen hundred dollars set apart for appellee's claim. We cannot but regard that part of the order as injudicious. It placed the receiver in a position where *his interest was in direct conflict with his duty.*"

So it will be seen that the controlling question in this case
83 was the same as that in *Herrick vs. Miller, supra*, viz., that the receiver could not assert a personal claim to the trust property. And in addition we find that the court had marshalled the assets of the insolvent.

Section 6941 *of Thompson on Corp.* is based *solely* on the two foregoing cases, and is therefore entitled to no more weight, nor to be decisive of any other principle, than they are.

In 3 *Md. Ch.* (*Re Colvin*) 278, a chancery court appointed a committee for a lunatic. Shortly afterwards the lunatic died and the court appointed a receiver to take charge of her property pending a litigation over her will. Later on the orphans' court appointed an administrator, and the question was, who was entitled to the possession of the property. There was no question of the receiver appealing from any order, distributing the assets in his hands, between rival claimants.

In *Chicago Title and Trust Company vs. Caldwell*, 58 *Ills. App.*, 219, the express object of the original bill was to dissolve an insolvent corporation and distribute its assets *pro rata* among its creditors. The lower court ordered the claim of Caldwell to be allowed against the estate for $850.

"To be paid *pro rata* with the claims of general creditors, and that the receiver pay to said Caldwell as dividends upon said sum

the same percentage thereof as paid upon other claims of unsecured creditors."

84 The case of *Strauss vs. Carolina Interstate B. & L. Association* we do not find reported at 24 *S. E. Rep.*, 740, as cited by appellee, and therefore cannot state with accuracy the nature of the proceeding.

Beverly vs. Brooke, 4 *Gratt.*, 208, also appears to be a controversy in which the court was administering the property for the benefit of *all creditors*, and involved no question of a receiver's right to appeal from an order distributing the assets between rival creditors.

In *People vs. Security Life Insurance Company*, 79 *N. Y.*, 267, it appeared that the receiver obtained an order requiring all creditors of the insolvent corporation to exhibit their claims within a specified time. Before the expiration of the time, he addressed a circular to the policy-holders to the effect that policies in force on the books of the company would be allowed without subjecting their holders to further proof; mislead by such circulars the holders did not make further proof of their claim. These were objected to by other creditors, and were accordingly rejected by the referee, to whom the cause was referred to take proof *as to distribution of the assets.* But before any dividend had been made the receiver applied for and obtained an order giving two months' further time within which such claims could be presented and established before the referee.

85 On this state of facts the court says:

"The learned counsel for the appellants contends that the receiver has no standing in court; that he can be heard only as to his fees and compensation, and had no right to be heard upon the motion which resulted in the order appealed from; and, second, that the court itself had no power to grant the order. *Upon both questions we think he is in error.* Since the receiver is an officer, or as he is sometimes called, 'the hand' of the court, *it would be singular if he could not at any time go to it* with his complaint, *or for instructions in regard to any matter touching the fund placed in his custody, and more especially when*, as in the case before us, *it is in danger*, through his own error, *of being unfairly distributed.* He is not to advocate the cause of one claimant as against another—between them is indifferent, owing a like duty to all, *and for that very reason* should, as far as possible, see to it that each has an equal opportunity to enforce his claim. *He stands as their representative and is bound to give them reasonable aid.*"

It is not to be forgotten that the above case was cited by appellee to support its contention that a receiver has no right of appeal, and we submit that it sustains the contrary.

Dorsey vs. Seibert, 93 *Ala.*, 312, comes nearer presenting a state of facts similar to the case at bar; but there is this vital distinction; first, it was a suit by a *general creditor* against the railway company, and therefore the funds arising from its operation *belonged* to general creditors who might intervene; second, the particular creditors did not intervene until after the property was sold, title made, and proceeds placed in the hands of the receiver for distribution.

86 Upon reference to the record (p. 31) it will be seen that the solicitors for the receiver in this foreclosure have also represented the complainant trustees.

We are aware that the better practice forbids this and requires that the receiver and the trustees, at whose suit he is appointed, should have separate counsel. In some circuits, especially in cases of great importance, the courts either appoint separate counsel for the receiver, or require the latter to do so.

Some trustees, the Central trust of New York, for instance, as a rule will not permit its local counsel to represent the receiver. In this case there were three mortgages foreclosed. The first mortgage by the Mercantile trust; the second by the Central trust, and the third by the Metropolitan trust—all consolidated by consent into one cause, in friendly co-operation for amicable foreclosure and reorganization. Both for unity of action and for economy, the undersigned solicitors, upon like consent of all concerned, have acted as local counsel for all the trustees and for the receiver.

Having reference to these facts and to the practice in this circuit, as illustrated by the *McLeod* and other cases and others herein discussed, we respectfully but urgently submit that if an example touching appeal in the name of receivers was needed to correct an objectionable practice, the object of the court has been fully
87 accomplished, and that the ends of justice do not require that the court should deny to clients a decision upon the merits involving possible severe pecuniary loss in order to give emphasis to the rule which the court desires to establish.

The opinion of the court has also been made the occasion in the public press for harsh and injurious personal criticisms against the receiver, and while we are aware and make haste to acknowledge, that the court is in no sense responsible for such result, yet that does not heal the smart to a just pride, or the injury to well-earned reputation. It is conceded he has been zealous, efficient and highly successful in the administration of his trust, has had the confidence of the court and the bondholders, and should be permitted to end his trust, now nearing its close, with praise rather than blame.

Under all the circumstances, if a rehearing were now granted, the object of the court would have been fully accomplished, and an opportunity would be given for a consideration and decision of the appeal upon the merits and upon the record.

It is hardly necessary to say to the court that nothing was further from the mind of counsel than to trouble it with mere moot questions. *Thom vs. Pittard*, in the light of *Farlow vs. Kelly*, to say nothing of the support found upon full review herein of text-writers and adjudicated cases, seem ample justification for the appeal
88 itself in the name of the receiver, and if a receiver's rights in the management of a suit are to be restricted by his being construed as the "hand" and the court which appoints him as the "head," it follows that "if the order granting the appeal should be treated as permission to appeal," then there is no rebellion of the hand against head.

While upon the merits, we rely with the utmost confidence for

success, upon the decision of the Supreme Court of the United States in the leading case cited upon our brief—*St. Louis, Alton & Terre Haute Railroad vs. C., C., C. & I. Railway*, 125 *U. S.*, 658, where that court unqualifiedly takes the ground that it is absolutely necessary to *aver and prove* a diversion before a mortgage lien can be postponed, we are all the more solicitous for a rehearing in view of the fact that there is already upon the docket of this court a second appeal, to be heard at the October term—No. 417—by the same receiver against different parties presenting similar questions but perfected before this opinion was rendered, the two appeals together involving above thirteen thousand dollars.

If a rehearing is granted, both can be fully heard at the October term, and the present opinion adhered to, or modified as equity may demand.

89 *Conclusion.*

In conclusion we, therefore, submit that the weight of authority sustains our contention that in cases in which the courts have taken possession of railroad property upon the application of a mortgagee seeking to foreclose its mortgage, the receiver represents no party but the estate itself, and that it is his duty to resist every attempt on the part of a stranger to diminish the same by depriving him of any portion of it, and that to retain the fullest possession he has the right to represent to the court of last resort for review any decree made by the lower court.

Again, that the repeated recognitions, and sanctions, by this court of this particular receiver's right to appeal, in this particular foreclosure proceeding, justifies his appeal in this particular case; and that if it is the desire of a court to discountenance these appeals it should remand this cause to the trial court, with directions to permit either the complainant in the original cause, or any party who has succeeded to its rights, to be made a party to this intervening petition, and with the right to appeal from a decree of the court to be made thereon.

90 *Prayer.*

For the reasons above stated the complainant respectfully petitions this court for a rehearing in this matter, and that the decision of this court, and any order to be entered thereon dismissing this appeal, may be set aside.

C. H. BOSWORTH, *Petitioner.*

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for Petitioner.

91 And afterwards, to wit, on the twelfth day of July, 1897, in the term and year last aforesaid, came the appellee, by its counsel, and filed in the clerk's office of said court its reply to appellant's petition for a rehearing; which said reply was in the words and figures following, to wit:

92 In the United States Circuit Court of Appeals, in the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver Chicago, Peoria and St. Louis Railway Company, Appellant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST LOUIS, Intervening Petitioner, Appellee.
No. 367.

Appellee's Reply to Appellant's Petition for Rehearing.

M. F. Watts and Samuel P. Wheeler, attorneys for appelle-.

Filed Jul- 12, 1897.

OLIVER T. MORTON, *Clerk.*

93 In the United States Circuit Court of Appeals in the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver Chicago, Peoria and St. Louis Railway Company, Appellant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner, Appellee.
No. 367.

Appellee's Reply to Appellant's Petition for Rehearing.

In his petition for rehearing, appellant contends that this court "misapprehended a most material fact," namely, that the admission that appellee's claim is a just claim, was an admission that
94 it is a just claim against the estate in the hands of the receiver. We confess our inability to comprehend the distinction the receiver seeks to make. He certainly does not take the position that under no circumstances can appellee's claim be considered a claim against the estate; he cannot contend that if there were assets of the estate more than sufficient to satisfy the demands of the bondholders, appellee's claim should not be paid out of such excess. He seems unable to understand that when the court took possession of the property of the insolvent railway company, it was for the purpose of doing that which the railway company could not or would not do, namely, paying the creditors of the railway company unsecured as well as secured, in the order in which equity might determine the priorities. Nor does he now seem able to comprehend the fact that the question of *preference or priority as between creditors is one which concerns the creditors only.* He has apparently forgotten the statement contained in his original brief,—"The only controversy is, as to whether or not the appellee is entitled on its petition and proof made thereunder, to have the vested lien of the mortgagee displaced to the extent of its claim." In reply to this, appellee claimed that this issue was one with which the receiver was in no way concerned, and that hence he had no appealable interest in the controversy; and this court so held. The admission that ap-

pellee's claim was just, and came within the purview of the court's order giving priority to material and labor claims accruing within six months prior to the appointment of the receiver, conceded only what the record clearly established. We beg to suggest that the receiver's petition for rehearing may be satisfactorily answered in a single
95 sentence. In his petition for rehearing (p. 3), he says: "We would find no difficulty in agreeing with the conclusion of the court that the receiver had no interest in the appeal, if we conceded the debt to be a just claim against the estate, for then clearly it would be a matter of indifference to him how it was satisfied." The simple and manifest answer to this is that the debt of the insolvent railway company to appellee, for material furnished and labor performed, within the period fixed by the court giving priority to such claims when properly presented and allowed, and conceded to be just, became a claim against the *estate of the insolvent railway company in the receiver's hands.* This is an elementary principle of law, and when the receiver is able to comprehend it he will understand why this court in dismissing his appeal held that in taking such appeal he was "an interloper obtruding himself, in breach of his duty, where he had no right." It matters not at whose instance, or what may be the nature or character of the legal procedure, whenever the estate of an insolvent comes in *custodia legis*, the party appointed by the court of chancery to take possession for that court, holds "for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principle it would if no change of possession had taken place." The words quoted are from *Fosdick vs. Schall*, 99 U. S., 235, and are quoted by the receiver in his petition for rehearing (p. 5). It is, however, apparent that in construing this citation the receiver has inadvertently substituted the word "receiver" for the word "court;" for he seeks to make it *his* duty to deter-
96 mine the rights of the parties, and having done this to direct the court to make the distribution in accordance with *his* findings.

The receiver apparently finds some difficulty in understanding the fact that the payment of a just debt allowed agaist the estate is not a diminution of the estate. The moment appellee's claim was allowed and conceded to be just, the appellee became, so far as the receiver is concerned, an absolute creditor of the estate, as much a creditor as the bondholder; and the payment of appellee's claim would be no more a diminution of the estate than would be the payment of the bondholder's claim—the question of priority between the two concerns; these two alone. The difference between the *diminution of the estate*—loss by fire, accident, theft, or taking of part of the assets by some one not a just creditor—and the *distribution of the assets of the estate*, the receiver fails wholly to grasp. From his standpoint every payment he makes out of the assets of the estate—the payment of his own salary, the payment of the fees of his counsel, the payment for supplies used by him in the operation of the property—is a diminution of the assets of the estate, and should be strenuously opposed, and he would be doing only his duty

in "carrying that resistance to the court of last resort."—(Petition for rehearing, p. 7.)

On page 8 of his petition for rehearing the receiver says: "In this case the receiver admits that there is no defense to the claim as against the railway company, but that *as against the estate* he deems it to be unjust, and that there is a good and valid defense to
97 it. In interposing that defense and carrying it to the court of last resort is he not performing the very duty which this court assigns to him?" No better reply to the query can be found than the vigorous answer of this court on page 5 of its opinion. What "good and valid defense" has he suggested in the 35 pages of his original brief and argument; in the 31 pages of his reply brief, or in the 39 pages of the petition for rehearing? Through the entire 105 pages of the dirge runs the one refrain,—"the payment of appellee's claim displaces the vested lien of the mortgagee!" This, and this alone, constitutes his good and valid defense! And yet, he resents the charge that he has "become the partisan advocate, when his duty demands of him impartiality and indifference with respect to the division of this common fund." (Op., 5.) It is difficult to conceive in what way he could make himself more distinctly, confessedly and avowedly the unsolicited champion of the interests of the uncomplaiming mortgagee or purchaser under the foreclosure proceedings, nor how he could show a greater disregard of his duty to remain impartial as between the creditors contesting the right of priority.

The receiver is distressed because in the opinion delivered by this court in this cause the court refers to the concession made at the argument by receiver's counsel to the effect that prior to the decree appealed from the railway had been sold under a decree of sale. The receiver is troubled lest in some manner this concession may have affected the decision of the court. So far as the principle of law laid down by the court in its opinion is concerned, such concession plays no part. The principle, namely, that as between
98 claimants—whose claims are admitted to be just—the receiver cannot become the guardian of the interests of one claimant as against the interests of the other, and that he must remain neutral, holds good without regard to who the parties in interest may be.

Great stress is placed on the case of *McLeod vs. City of New Albany*, 66 Fed. Rep., 378. This case was cited at length by the receiver in his reply brief, read from at the argument, and the petition for rehearing (pp. 10 and 11) contains the same quotation from this case found in the reply brief (p. 20). Doubtless that case was fully considered by this court when the opinion herein was prepared, but was not referred to or commented upon because it does not in any manner or to any extent support the receiver's contention. On the contrary, the decision in that case is in entire harmony with the decision rendered by this court in this cause, and is within the unbroken line of decisions defining the receiver's duty. In the quotation given by the receiver from the *McLeod* case, occurs this passage: "It was their duty to preserve the estate and to pay the taxes thereon. *If the taxes*

were illegally laid, it was their duty, representing all the interests, to contest the payment." In that case, as in this, it was the duty of the receiver to see that the claim was *just*. The justness of the claim being conceded, the receiver's duty ended so far as resistance of payment of the claim was concerned. And so in every case cited by the receiver in support of his right to take the appeal, such right has been conceded only where the determination of the question involved might work a diminution or increase of the estate as a whole. The same is true of the citations from the text-writers,
99 High and Beach. For instance, in the citation from High, that author says, the receiver "has the same right to appeal from an adverse judgment for the recovery of funds pertaining to his receivership *as the party over whom he was appointed would have*." And in the citation from Beach, it is said, "The receiver, as a party defendant to the action, has the same right to appeal from a judgment of the court affecting the interes s of the estate represented by him that the *party or corporation to whom the estate originally belonged would have had* if the suit had been brought against them." In other words, these text-writers hold this and only this, that the receiver can make for the party, whose property has been placed in his hands the same defense the party himself could make. This principle has never been questioned, but it being admitted in this case that the railway company could make no defense to appellee's claim, it follows of necessity the receiver can make no defense. The failure on the part of the receiver to comprehend the difference between *diminution of the estate* and *distribution of the assets of the estate* is well illustrated by the closing sentence on page 17 of the petition for rehearing, where he says it is the duty of the receiver "to resist the diminishing of the estate by the payment to a general creditor in priority over all other creditors." We beg to ask how the creation of a preference or priority as between creditors can work a diminishing of the estate? And what possible interest has the receiver in the creation of such preference or priority?

The suggestion that the question of the receiver's right to appeal should have been raised on motion to dismiss, and hence
100 could not be made in appellee's brief or at the argument when the case was submitted on its merits, is answered by the receiver's admission that such a question can be raised by the court of its own motion. If the court will, of its own motion, dismiss because of the want of appealable interest, the exercise of this power is certainly not abridged because the appellee suggests to the court such want of appealable interest.

We cannot pass over in silence the concluding pages of the petition for rehearing. This court will understand, without any suggestion from us, that the opinion rendered by it in this case announces no new or startling doctrine, though it does define more clearly and concisely than any Federal court has heretofore done, the relation of the receiver to creditors, and it justly rebukes the conduct of the receiver in making himself the partisan champion of the interests of one creditor as against another. In taking the appeal in this case it is the receiver who has attempted an innova-

tion in practice, which this court saw fit to rebuke, and in terms which need no defense from us, or modification, may we beg to say, on the part of the court.

The receiver sees proper, on page 35 of his petition for rehearing, to call the attention of the court to the fact that "the solicitors for the receiver in this foreclosure have also represented complainant's trustees." In this connection we deem it proper to call the attention of the court to the second paragraph on page 38 of the petition for rehearing, in which the receiver makes the remarkable request that this cause be remanded to the trial court, "with directions to permit either the complainant in the original cause, or any party
101 who has succeeded to its rights, to be made a party to the intervening petition, and with a right of appeal from a decree of the court thereon." We marvel at the temerity of this request. It is an open and bold declaration that the receiver still represents the complainant in the original cause or its successor in interest; that he still has no regard for the obligations and duties of his position as clearly defined in the opinion of this court in this cause; and that in spite of the injunction of this court he will insist upon "obtruding himself, in breach of his duty, where he has no right, and in a matter in which he is not concerned." If he felt that the decision of the court was erroneous and rendered without proper and full consideration, it was his right to ask for a rehearing; but when this court in dismissing his appeal tells him that as between appellee and the original complainant or its successor in interest he has no right to interfere, that he is an interloper, his request to this court, now made in his petition for rehearing, that the original complainant, or its successor in interest, be allowed to take an appeal, falls little short of contempt of court.

Appellee's claim matured four years ago, and on every principle of equity its payment should not longer be delayed, especially when payment has never been resisted by any party in interest. We respectfully ask that the receiver be permitted no longer to thwart the ends of justice, and that his petition for a rehearing be promptly denied.

M. F. WATTS AND
SAMUEL P. WHEELER,
Attorneys for Appelle-.

102 October Term, A. D. 1897.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on the fifth day of October, 1897, of the October term, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the one hundred and twenty-second.

And afterwards, to wit, on the sixth day of October, 1897, in the October term last aforesaid, in the record and proceedings thereof in said entitled cause appears the following, to wit:

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervenor. } 367.

Appeal from the circuit court of the United States for the southern district of Illinois.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby, denied.

103 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from one to one hundred two, inclusive, contain a true copy of the transcript of the record and proceedings in the United States circuit court of appeals for the 7th circuit in the case of C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway Company, *vs.* Terminal Railroad Association of St. Louis, No. 367, October term, 1896, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 18th day of November, A. D. 1897.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

104 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner. } No. 367.

It is stipulated by and between the parties hereto, by their respective counsel, that the certified copy of the transcript of record in this cause, filed by the clerk of this court in the Supreme Court of the United States in the application there made for a writ of certiorari, in the cause there entitled "C. H. Bosworth, receiver, *vs.* The Terminal Railroad Association of St. Louis, No. 535, October term, 1897," shall be taken as a return to the writ of certiorari

granted by said Supreme Court in said cause on the 19th day of January, 1898.

SAMUEL P. WHEELER,
Solicitor for Terminal R. R. Ass'n of St. Louis.
BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

105 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing typewritten page *inclusive* contain- a true copy of the stipulation filed July 26th, 1898, in the case of C. H. Bosworth, receiver *vs.* The Terminal Railroad Association of St. Louis, No. 367, October term, 1896, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 26th day of July, A. D. 1898.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

106 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

Being informed that there is now pending before you a suit in which C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company is appellant and The Terminal Railroad Association of St. Louis is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of Illinois, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
107 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

108 UNITED STATES OF AMERICA, }
Seventh Circuit. }

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway Company, appellant, *vs.* The Terminal Railroad Association of St. Louis, appellee, is a full, true, and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals for the seventh circuit, together with all proceedings in said court.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 26th day of July, A. D. 1898.

OLIVER T. MORTON,
Clerk United States Circuit Court of Appeals for the Seventh Circuit.

[Endorsed:] 16,748. Supreme Court of the United States. No. 211, October term, 1898. C. H. Bosworth, receiver, &c., *vs.* Terminal Railroad Association of St. Louis. Writ of certiorari and return. Office Supreme Court U. S. Filed Aug. 19, 1898. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,748. U. S. C. C. of appeals, 7th circuit. Term No., 211. C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis railway, petitioner, *vs.* Terminal Railroad Association of St. Louis, intervening petitioner. Filed December 13, 1897.

9800
DEC 13 1897
JAMES H. McKENNEY
CLERK

Supreme Court of the United States

October Term, 1897.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,

Appellant,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,

Appellee.

Petition for Writ of Certiorari

TO

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BLODGETT WILSON AND
PHILIP BARTON WILSON,
Solicitors for Petitioner.

Supreme Court of the United States

October Term, 1897.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,
Appellant,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,
Appellee.

Petition for Writ of Certiorari.

To the Supreme Court of the United States of America:

The petition of C. H. Bosworth, Receiver of the Chicago, Peoria & St. Louis Railway for a writ of certiorari, directed to the United States Circuit Court of Appeals for the Seventh Judicial Circuit, under the provisions of Section 6 of the Act of Congress, approved March 3d, 1891, and ordering that the records in a certain appeal be certified to this honorable court for its review and determination. Said appeal is entitled as follows: "C. H. Bosworth, Receiver of the Chicago, Peoria & St. Louis Railway, *Appellant*, vs. Terminal Railroad Association of St. Louis, Intervening Petitioner, *Appellee;* No. 367; October Term, 1896;

United States Circuit Court of Appeals, for the Seventh Circuit."

Statement of the Case.

Your petitioner thereupon respectfully shows to this honorable court, as follows:

That on the 21st day of September, 1893, the Mercantile Trust Company of New York, filed its bill of complaint in the United States Circuit Court for the Southern District of Illinois against the Chicago, Peoria & St. Louis Railway Company, praying a foreclosure of its mortgage, and the appointment of a receiver *pendente lite*. Thereafter, on the same day, an order was entered on the said bill of complaint, appointing C. H. Bosworth and E. Ellery Anderson receivers of the railroad and property of the said Chicago, Peoria & St. Louis Railroad Company, clothing them with all the authority and rights usually given to receivers by courts of equity to take charge of and operate railroads and the general administration of the same for the benefit of the mortgage bondholders.

Among other things, this order contained a direction to the receiver to collect and receive the tolls, rents, moneys, issues and profits of said premises and property, and out of the same equip, maintain and keep the property in good repair and pay, among other things (R. p. 25):

> "Fourth: All claims for materials and supplies which have been incurred in the operation and maintenance of

> said property during the six months last passed, and all ticket, trackage and traffic balances due from connecting railroads. To which last item, number four, counsel for the Mercantile Trust Company, trustee, objects, and which objection the Court, upon argument, overrules."

On the 27th day of May, 1895, the Terminal Railroad Association of St. Louis filed its intervening petition in this foreclosure cause, and alleged that within the six months prior to the appointment of the receivers, it performed certain labor and furnished certain materials for and to the defendant railway company, amounting in value to the sum of $8,162.11, and prayed that the same "be allowed and ordered to be paid under the order of this Court (Circuit) heretofore made herein, directing the payment by the receivers of debts incurred by said Chicago, Peoria & St. Louis Railway Company within six months prior to the appointment of the receiver." (R. p. 26.)

To this intervening petition the receivers, on June 8th, 1895, filed their answer (R. p. 28), first saving all benefit and advantage of exception to the errors, uncertainties and imperfections in the petition, and then averred that the facts set forth in the petition might be true, but that they were utter strangers to the same and could not form any belief thereon. And further answering, the receivers denied that the petitioner was entitled to the relief or any part thereof demanded, and prayed the same advantage of their answer as if they had pleaded or demurred to the petition.

The said intervening petition, under a general order of reference (not made, however, by consent of the parties), went to Stuart Brown, as master in chancery, and he, after hearing certain evidence, made and filed his report on January 6th, 1896, wherein and whereby he reported that he had examined the petition and answer, had taken evidence, and thereupon found that there was due the petitioner, for labor and material furnished, the sum of $8,162.11, and that such sum was a lien on the property of the defendant company, prior and superior to the claim of the mortgage bondholders, and that it should be paid out of the surplus income, *or from a sale of the property.* (R. p. 29.)

To this report the receiver, on the 29th day of January, 1896, filed his exceptions (R. p. 30), and these exceptions were thereafter, on the 30th day of July, 1896, overruled by the Circuit Court, and a decree entered on the petition in conformity with the report of the master. (R. p. 31.)

The said decree directed the receiver to pay to the intervener the sum of $8,162.11, out of the income of the receivership, if any such income was in his hands, and in case he had no funds in hand for this purpose, *directed that the same be paid out of the proceeds of the sale of the mortgaged premises*, in preference to the mortgage debt. (R p. 32.)

From this decree the receiver prayed and obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and to that end filed the following petition and assignment of errors, to-wit:

Petition for Appeal.

"The petition of C. H. Bosworth, receiver herein, showeth unto Your Honor that a final decree was rendered in the above entitled cause on the 30th day of July, 1896.

Whereby it was ordered, adjudged and decreed that your petitioner should pay over to the said Terminal Railroad Association, of St. Louis, the sum of $8,162.11.

"Your petitioner further states to Your Honor that he has assigned errors upon the record in said cause, specifying errors, as he alleges, in the record and judgment aforesaid. He therefore prays that your Honor will grant an appeal from the said judgment and decree, to your petitioner, upon condition that he enters into bond in the sum of $500, with surety to be approved by this Honorable Court, in such time as Your Honor shall order and decree."

Assignment of Errors.

"And now comes C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his solicitors, and says there is manifest error in the record and proceedings in the above entitled judgment and decree, and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness.

4. The court erred in failing and refusing to order, adjudge and decree that the claim of the intervener was not entitled to a lien prior to that of the mortgage bondholders on the mortgaged premises of the defendant railway company.

5. The court erred in ordering, adjudging and decreeing the said C. H. Bosworth, as receiver, to pay to the intervening petitioner the sum of $8,162.11, with interest from said date, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that the said intervener be paid the sum of $8,162.11 out of the proceeds of the sale of the mortgaged premises of the defendant railway company ahead of the mortgage debt.

Whereby, the plaintiff in error prays that the judgment and decree be reversed and annulled. ''

Thereupon the said Circuit Court for the Southern District of Illinois entered an order allowing said appeal, which order is as follows:

Order Allowing Appeal and Approving Bond.

"Now on this 18th day of November, 1896, the same being one of the days of the June term, A. D. 1896, of this court, comes C. H. Bosworth, receiver herein, and files his petition for appeal from the order and decree of the court entered herein on the 30th day of July, 1896; and it appearing to the court that said petition is in due form, it is hereby ordered, adjudged and decreed that the prayer of said petition be, and the same is hereby granted; that the appeal be, and the same is hereby allowed the said C. H. Bosworth, receiver, from said order and decree of July 30th, 1896, to the United States Circuit Court of Appeals for the Seventh Circuit, upon the said C. H Bosworth, as such receiver, entering into bond in the sum of $500, with surety to be approved by this court, which bond, it appears to the court, is herewith submitted and approved."

The said appeal having been thus allowed, came on for hearing in said Circuit Court of Appeals before their honors, Judges Woods, Showalter and Jenkins, and was fully argued in said court, and subsequently, on the 7th day of June, 1897, the said Circuit Court of Appeals handed down its decision, wherein and whereby the said appeal was dismissed

on the ground that the receiver *had no right to appeal* from the decision of the Circrit Court, a copy of which opinion is attached to the transcript of record certified to this court.

That thereafter, on or about the 25th day of June, 1897, your petitioner, as appellant, filed his petition in said Circuit Court of Appeals for a rehearing, which petition was subsequently on or about the 6th day of October, 1897, by said Court of Appeals overruled, and which petition is also attached to the transcript of record certified to this honorable court.

Your petitioner further respectfully represents that the meritorious question presented to said Court of Appeals, by said appeal, was as to the right to displace vested contract liens in favor of unsecured creditors, in railroad foreclosures, where there had been no diversion of income; that the decision of the Circuit Court from which said appeal was prosecuted is at variance with decisions of this Honorable Court and with certain Circuit Courts of Appeal, and that the same involves a grave and important question of law, about which there is much conflict in the decisions of the Circuit Courts of the United States and of the several United States Circuit Courts of Appeals.

Your petitioner further respectfully represents that the decision on the question of practice rendered by said Court of Appeals is at variance with the decision

of this Honorable Court as well as with the decisions of the Circuit Courts of Appeals for the Fourth and Sixth Circuits; that the errors made therein can only be authoritively corrected in this Honorable Court; and as to the matters so at variance, as well as to divers other matters, the said decision of the said Circuit Court of Appeals for the Seventh Circuit contains manifest errors of law; and that the matters as to which the said Court of Appeals has adjudicated adversely to your petitioner, and more particularly the matters as to which said decision is in conflict with the decision made by the Circuit Courts of Appeals for the Fourth and Sixth Circuits, and the law announced by this Honorable Court, are matters irreparably injurious to your petitioner, and the estate he is administering as receiver.

Your petitioner further respectfully represents that the decision rendered by said Court of Appeals involves a most important and far-reaching question of practice to all litigants in railroad foreclosures, and that by reason of the conflict of decisions between the Circuit Courts of Appeals in the Fourth and Seventh Circuits, it is the province of this Honorable Court to harmonize and correct the same.

Assignment of Variance.

First.

The decision of the Court of Appeals for the Seventh Circuit is at variance with the decision of the Court of Appeals for the Fourth Circuit in this: That in the case at bar the court says:

> "By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it. He has no such right. He is, in so doing, an interloper obtruding himself in breach of his duty where he has no right, and in a matter with which he is not concerned."

While in *Thom vs. Pittard, 10 C. C. A., 352*, the Court of Appeals for the Fourth Circuit says:

> "It is claimed that the receiver, the officer and servant of the court, subject to its orders, without personal interest in the funds under his control, which are to be accounted for as the court may direct, is not to be permitted to refuse to obey the court's orders by appealing from its decrees. But we must remember that the receiver represents all the parties in interest. He stands for the railroad company as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders. While he has no personal interest in the proceedings, except to faithfully and impartially discharge his duties, it is incumbent upon him to faithfully protect the property confided to his keeping; to report to the court all matters connected therewith relating to its safe keeping, and *proper disposition*; to obtain permission to sue for debts due, and leave to pay claims owing by him. *Permission given the receiver to sue, or direction to him to defend, should take with it the right to follow the suit to the court of last resort.*"

Second.

The decision of the Court of Appeals for the Seventh Circuit is at variance with the decision of the Court of Appeals for the Fourth Circuit in this:

That in the case at bar the court says:

> "Neither the trustee, nor the bondholders, nor the purchaser is here objecting; who made the receiver the guardian of their interests in this regard?"

While in *Thom vs. Pittard, 10 C. C. A. 352*, the Court of Appeals for the Fourth Circuit says:

> "But we must remember that the receiver represents all the parties in interest. He stands for the railroad company as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders."

And again, in the latter the court says:

> "While it is true that any of the defendants to said chancery suit, interested in the property of the railroad company, *and in its proper distribution*, as also the plaintiffs, *could have appealed* from said decree in favor of appellee, proper steps therefor having been taken, *still it does not follow that the receiver, who was in fact the defendant*, so far as the issues raised by the petition were concerned, *could not also appeal.*"

Third.

The decision of the Court of Appeals for the Seventh Circuit is at variance with the decision of the Court of Appeals for the Sixth Circuit in this:

That in the case at bar the court says:

> "By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it. He has no such right. He is in so doing an interloper, obtruding himself in breach of his duty where he

has no right, and in a matter with which he is not concerned."

While in *Felton vs. Ackerman, 9 C. C. A., 457*, the Court of Appeals for the Sixth Circuit says:

"While it is true that the receiver is an arm of the court in the administration of the property, yet, where persons intervene to obtain relief against him, because they cannot obtain full relief in any other forum, the issued raised by his answer to the petition makes the proceeding an adversary one, in which the receiver *represents the interests of the owners of the property*, of which he is temporarily in charge. If, *as such representative*, he feels aggrieved by an order of the court made in an adversary proceeding of this character, it is difficult to see why he should not be permitted to have the order of the court reviewed by the appellate tribunal to which any other litigant may resort. Certainly the owners of the property, if aggrieved by the order against the receiver, *might appeal, and there would seem to be no justice in preventing the temporary custodian of their property from doing so.*"

Assignment of Error.

First.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no interest in the controversy, for the reason that the intervening petition prayed relief against the said Bosworth, and the issue raised by the answer thereto made the proceeding an adversary one, in which the said Bosworth represented the interests of whomsoever might be ultimately adjudged to be entitled to the estate of which he was temporarily in charge as such receiver.

Second.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no right to appeal from the decree of the Circuit Court for the Southern district of Illinois, for the reason that the said Circuit Court expressly authorized and directed the said Bosworth to prosecute said appeal.

Third.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no right to appeal, for the reason that it is incumbent upon him to carefully protect the property confided to his keeping as receiver, and the right to sue or defend carries with it the right to follow the suit to the court of last resort.

Fourth.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no interest in the controversy, for the reason that the said C. H. Bosworth, as receiver, represents all the parties to the original foreclosure cause, as against the parties who may attempt, by a separate and distinct action, to diminish and segregate the estate which he was appointed to conserve.

Fifth.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on

the ground that he did not represent the parties to the original foreclosure cause as against the Terminal Railroad Association, a stranger thereto, attempting to diminish and segregate the estate in controversy between the parties to the original cause.

Sixth.

The Court of Appeals for the Seventh Circuit erred in deciding that the receiver represented the Terminal Railroad Association as well as the mortgagee in the protection and safe keeping of the income of the receivership and the property in controversy between the parties to the original foreclosure cause.

Seventh.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that *prima facie* the mortgagee was entitled to the property in litigation and to the income of the receivership, and that, as to the protection and safe keeping of the same, the receiver represented the mortgagee as against the Terminal Railroad Association.

Eighth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the receiver, in the care and custody of the property, represented solely the parties to the original foreclosure cause, until some other party by intervention acquired a substantial, prior or equal right therein by a final adjudication in a court of last resort.

Ninth.

The Court of Appeals for the Seventh Circuit erred in concluding it to be conceded that the debt in controversy was a just claim against the *estate* from the statement in appellant's brief that there was "no controversy as to the labor having been performed or the material furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same," for the reason that such language can only be construed to concede the claim to be just as against the defendant railway company.

Tenth.

The Court of Appeals for the Seventh Circuit erred in assuming as the basis for its judgment "that prior to the decree appealed from, the railway had been sold under decree of sale and has passed out of the possession of the receiver and into the possession of the purchaser, and also that the receiver had not in hand moneys with which to pay the debts adjudged," for the reason that the record in the cause is wholly silent as to such facts.

Eleventh.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to reverse and annul the decree of the Circuit Court for the Southern District of Illinois.

Twelfth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that before the Terminal Railroad Association was entitled to have its claim paid out of the income of the receivership it should allege and prove that the income arising from the current earnings of the railway company was diverted from the payment of current expenses to the payment of the mortgage debt.

Thirteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that before the Terminal Railroad Association was entitled to have its claim paid out of the proceeds of the sale of the mortgaged premises, ahead of the mortgage indebtedness, it should allege and prove that the net income arising from the operation of the property by the receiver, after paying all necessary operating expenses, was applied to the betterment of the mortgaged property.

Fourteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that even if there had been such a diversion of the income arising from the current earnings of the railway company, or from the current earnings of the receiver, the amount of restoration depends upon the amount of diversion, and before the Terminal Railway Association was entitled to have its claim paid out of either the income

of the receivership or the proceeds of the sale of the mortgaged premises, it should have alleged and proved that the amount so diverted aggregated at least the amount of its claim.

Fifteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the income arising from the current earnings of the railway company was diverted from the payment of current expenses to the payment of the mortgage debt, principal or interest.

Sixteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the net income arising from the operation of the property by the receiver was diverted to the betterment of the mortgaged property.

Seventeenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the mortgage bondholders had received that which in equity belonged to the general creditors of the railway company.

Eighteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railway Association relied wholly, for its right of recovery, on the order appointing the receiver, directing him to pay certain claims; and in failing and refusing to decide that such order alone is not a sufficient ground of recovery.

A certified copy of the transcript of the record in this case is herewith filed as a part of this application for the Writ of Certiorari.

Whereupon your petitioner respectfully prays that this honorable court will be pleased to grant a Writ of Certiorari requiring the case entitled, "C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway, appellant, vs. Terminal Railroad Association of St. Louis, intervening petitioner, appellee. No. 367. United States Circuit Court of Appeals for the Seventh Judicial Circuit," to be certified to this Honorable Court for its review and determination.

C. H. BOSWORTH, *Receiver*,
Chicago, Peoria and St. Louis Railway.

BLUFORD WILSON and
PHILIP BARTON WARREN,
Solicitors for Petitioner.

Supreme Court of the United States

October Term, 1897.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,
Appellant,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,
Appellee.

Brief of Petitioner.

STATEMENT.

This is an application by C. H. Bosworth, as receiver of the Chicago, Peoria and St. Louis Railway, for a Writ of Certiorari to be directed to the United States Circuit Court of Appeals for the Seventh Circuit, to review a decision of said court dismissing the appeal of petitioner from a decree of the United States Circuit Court for the Southern district of Illinois, directing the said C. H. Bosworth to pay to the Terminal Railroad Association the sum of $8,162.11 out of the income of said receivership, and in default thereof

out of the proceeds of the sale of the mortgaged premises, ahead of the mortgage debt.

That appeal grew out of the following state of facts:

On the 21st day of September, 1893, the Mercantile Trust Company of New York filed its Bill of Complaint in the United States Circuit Court for the Southern District of Illinois against the Chicago, Peoria and St. Louis Railway Company, praying a foreclosure of its mortgage; and the appointment of a receiver *pendente lite*. Thereafter, on the same day, an order was entered on this bill of complaint appointing C. H. Bosworth and E. Ellery Anderson receivers of the railroad and property of the said Chicago, Peoria and St. Louis Railway Company, clothing them with all the authority and rights usually given to receivers by courts of equity to take charge of and operate railroads in the general administration of the same for the benefit of mortgage creditors.

Among other things this order contained a direction to the receivers to collect and receive the tolls, rents, moneys, issues and profits of said premises and property, and out of the same equip, maintain and keep the property in good repair, and pay, among other things, (R. p. 25) "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last passed and all tickets, trackage and traffic bal-

ances due from connecting railroads." To this, counsel for the Mercantile Trust Company objected, and upon argument the court overruled the objection.

On the 27th day of May, 1895, the Terminal Railroad Association of St. Louis filed its intervening petition in this foreclosure cause, and alleged that within the six months prior to the appointment of the receivers it performed certain labor and furnished certain materials for and to the defendant railway company, amounting in value to the sum of $8,162.11, and prayed that the same be allowed and ordered to be paid under the order of the court appointing the receivers. (R. p. 26.)

To this intervening petition the receivers on June 8, 1895, filed their answer, (R. p. 28) first saving all benefit and advantage of exception to the errors, uncertainties and imperfections in the petition, and then averring that the facts set forth in the petition might be true, but that they were utter strangers to the same, and could not form any belief thereon, and prayed strict proof thereof; and further answering, denied that the petitioner was entitled to the relief, or any part thereof demanded, and prayed the same advantage of their answer as if they had pleaded and demurred to the petition.

This intervening petition under a general order of reference went to Stuart Brown, as master in chancery, and he, after hearing certain evidence, made and

filed his report on January 6th, 1896, wherein and whereby he reported that he had examined the petition and answer and taken evidence, and found that there was due the petitioner, for labor and materials furnished, the sum of $8,162.11. and that such amount was a lien on the property of the defendant company, prior and superior to the claims of the mortgage bondholders, and that it should be paid out of the surplus income, or from a sale of the property. (R. p. 29.)

To this report, the receiver, on the 29th day of January, 1896, filed his exceptions (R. p. 30), and these exceptions were thereafter, on the 30th day of July, 1896, overruled by the Circuit Court; and a decree entered on the petition in conformity with the report of the master. (R. p. 31.) From this decree the receiver prayed and obtained an appeal to the Court of Appeals for the Seventh Circuit.

It is to be particularly noted that the trustee under the mortgage sought to be foreclosed by the proceeding in which the receivers were appointed, lost no time in taking active steps to pursue the remedy provided in default of the covenants of the mortgage, to be performed by the mortgagor. The bill to foreclose was filed just twenty days after default in the payment of the interest coupons attached to the bonds, (R. p. 5) and the court took immediate possession of the property through its receivers. (R. p. 22.) It is also to be noted that the intervening petitioner neither

averred in its petition nor proved that there had been a diversion of the income of the railway company from the payment of operating expenses to the payment of interest due on the mortgage bonds; nor in any way that the mortgage creditors, whose vested contract lien it sought to displace, had received possession of that which in equity belonged to the whole or a part of the general creditors. On the contrary, the petitioner relied entirely for its right to priority on the order of the Circuit Court, appointing the receivers for this property, directing them to pay all claims for materials and supplies incurred within the six months next preceding. (R. p. 26.)

The said appeal came on for hearing, was fully argued in the said Court of Appeals, and subsequently, on the 7th day of June, 1897, the said court handed down its decision dismissing the said appeal, on the principal ground that the receiver had no interest in the controversy and had no right to appeal from the decree of the Circuit Court which appointed him.

Thereafter, on the 25th day of June, 1897, the receiver filed his petition in said Court of Appeals for a re-hearing, but said petition was also denied.

Because of the importance of the question of practice as to a receiver's right to appeal, and the conflict between the decisions of the several Courts of Appeals on that question; and also because of the importance

of the question of law raised on the merits of the controversy, and of the conflict in the decisions of the several Courts of Appeals with this Honorable Court on that question, the receiver feels justified in presenting to this court a petition for a Writ of Certiorari to the said Circuit Court of Appeals for the Seventh Circuit.

The issue raised by the intervening petition of the Terminal Railroad Association filed in the original foreclosure cause, pending in the United States Circuit Court for the Southern District of Illinois, and the answer of the receiver to said intervening petition, is solely the right of the intervenor to have its claim paid out of the income in the hands of the receiver arising from the operation of the railway property. (R. p. 26, 27.) And although the only party made defendant to said intervening petition was the receiver, *and the only relief prayed was against the income*, nevertheless the said Circuit Court entered a decree not only directing the receiver to pay the demand out of the income, *but also directed that in default thereof, said demand should be paid out of the proceeds of the sale of the mortgaged premises ahead of the mortgage debt.*

Ever since the institution of this receivership the burden of defending these assaults on the receiver's possession, both of the property and income, has fallen entirely on the receiver, who has conducted the

same solely in his own name; and in every case which has been appealed the said Court of Appeals entertained the appeal, and disposed of the case on its merits.

See *Mather Humane Transportation Company vs. Bosworth, 76 Fed. Rep., 164.*

Hook vs. Bosworth, 64 Fed. Rep., 443.

Bosworth vs. National Bank, 64 Fed. Rep., 615; and *Bosworth vs. Francis Hook, 77 Fed. Rep. 686.*

It was not until the present case that the Court of Appeals decided the receiver had no interest in such controversies and no right to appeal; and in this case it dismissed the appeal *sui sponte* and characterized the issues raised by the pleadings and the errors assigned on the record as presenting merely moot questions.

The denial of this right to appeal involves an important question of practice and is directly in conflict with the decisions of the Courts of Appeals for the Fourth and Sixth Circuits, and we submit is manifest error.

The refusal of the Court of Appeals to dispose of this case on its merits and to reverse the decree of the Circuit Court for the Southern District of Illinois leaves the receiver no recourse save this application to this Honorable Court.

Assignment of Variance.

First.

The decision of the Court of Appeals for the Seventh Circuit is at variance with the decision of the Court of Appeals for the Fourth Circuit in this: That in the case at bar the court says:

> "By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it. He has no such right. He is, in so doing, an interloper obtruding himself in breach of his duty where he has no right, and in a matter with which he is not concerned."

While in *Thom vs. Pittard, 10 C. C. A., 352*, the Court of Appeals for the Fourth Circuit says:

> "It is claimed that the receiver, the officer and servant of the court, subject to its orders, without personal interest in the funds under his control, which are to be accounted for as the court may direct, is not to be permitted to refuse to obey the court's orders by appealing from its decrees. But we must remember that the receiver represents all the parties in interest. He stands for the railroad company as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders. While he has no personal interest in the proceedings, except to faithfully and impartially discharge his duties, it is incumbent upon him to faithfully protect the property confided to his keeping; to report to the court all matters connected therewith relating to its safe keeping, and *proper disposition*; to obtain permission to sue for debts due, and leave to pay claims owing by him. *Permission given the receiver to sue, or direction to him to defend, should take with it the right to follow the suit to the court of last resort.*"

Second.

The decision of the Court of Appeals for the Seventh Circuit is at variance with the decision of the Court of Appeals for the Fourth Circuit in this:

That in the case at bar the court says:

> "Neither the trustee, nor the bondholders, nor the purchaser is here objecting; who made the receiver the guardian of their interests in this regard?"

While in *Thom vs. Pillard, 10 C. C. A. 352*, the Court of Appeals for the Fourth Circuit says:

> "But we must remember that the receiver represents all the parties in interest. He stands for the railroad company as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders."

And again, in the latter the court says:

> "While it is true that any of the defendants to said chancery suit, interested in the property of the railroad company, *and in its proper distribution*, as also the plaintiffs, *could have appealed* from said decree in favor of appellee, proper steps therefor having been taken, *still it does not follow that the receiver, who was in fact the defendant*, so far as the issues raised by the petition were concerned, *could not also appeal.*"

Third.

The decision of the Court of Appeals for the Seventh Circuit is at variance with the decision of the Court of Appeals for the Sixth Circuit in this:

That in the case at bar the court says:

> "By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it. He has no such right. He is in so doing an inter-

loper, obtruding himself in breach of his duty where he has no right, and in a matter with which he is not concerned."

While in *Felton vs. Ackerman, 9 C. C. A., 457*, the Court of Appeals for the Sixth Circuit says:

> "While it is true that the receiver is an arm of the court in the administration of the property, yet, where persons intervene to obtain relief against him, because they cannot obtain full relief in any other forum, the issued raised by his answer to the petition makes the proceeding an adversary one, in which the receiver *represents the interests of the owners of the property*, of which he is temporarily in charge. If, *as such representative*, he feels aggrieved by an order of the court made in an adversary proceeding of this character, it is difficult to see why he should not be permitted to have the order of the court reviewed by the appellate tribunal to which any other litigant may resort. Certainly the owners of the property, if aggrieved by the order against the receiver, *might appeal, and there would seem to be no justice in preventing the temporary custodian of their property from doing so.*"

Assignment of Error.

First.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no interest in the controversy, for the reason that the intervening petition prayed relief against the said Bosworth, and the issue raised by the answer thereto made the proceeding an adversary one, in which the said Bosworth represented the interests of whomsoever might be ultimately adjudged to be entitled to the estate of which he was temporarily in charge as such receiver.

Second.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no right to appeal from the decree of the Circuit Court for the Southern district of Illinois, for the reason that the said Circuit Court expressly authorized and directed the said Bosworth to prosecute said appeal.

Third.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no right to appeal, for the reason that it is incumbent upon him to carefully protect the property confided to his keeping as receiver, and the right to sue or defend carries with it the right to follow the suit to the court of last resort.

Fourth.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no interest in the controversy, for the reason that the said C. H. Bosworth, as receiver, represents all the parties to the original foreclosure cause, as against the parties who may attempt, by a separate and distinct action, to diminish and segregate the estate which he was appointed to conserve.

Fifth.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on

the ground that he did not represent the parties to the original foreclosure cause as against the Terminal Railroad Association, a stranger thereto, attempting to diminish and segregate the estate in controversy between the parties to the original cause.

Sixth.

The Court of Appeals for the Seventh Circuit erred in deciding that the receiver represented the Terminal Railroad Association as well as the mortgagee in the protection and safe keeping of the income of the receivership and the property in controversy between the parties to the original foreclosure cause.

Seventh.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that *prima facie* the mortgagee was entitled to the property in litigation and to the income of the receivership, and that, as to the protection and safe keeping of the same, the receiver represented the mortgagee as against the Terminal Railroad Association.

Eighth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the receiver, in the care and custody of the property, represented solely the parties to the original foreclosure cause, until some other party by intervention acquired a

substantial, prior or equal right therein by a final adjudication in a court of last resort.

Ninth.

The Court of Appeals for the Seventh Circuit erred in concluding it to be conceded that the debt in controversy was a just claim against the *estate* from the statement in appellant's brief that there was "no controversy as to the labor having been performed or the material furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same," for the reason that such language can only be construed to concede the claim to be just as against the defendant railway company.

Tenth.

The Court of Appeals for the Seventh Circuit erred in assuming as the basis for its judgment "that prior to the decree appealed from, the railway had been sold under decree of sale and has passed out of the possession of the receiver and into the possession of the purchaser, and also that the receiver had not in hand moneys with which to pay the debts adjudged," for the reason that the record in the cause is wholly silent as to such facts.

Eleventh.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to reverse and annul the

decree of the Circuit Court for the Southern District of Illinois.

Twelfth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that before the Terminal Railroad Association was entitled to have its claim paid out of the income of the receivership it should allege and prove that the income arising from the current earnings of the railway company was diverted from the payment of current expenses to the payment of the mortgage debt.

Thirteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that before the Terminal Railroad Association was entitled to have its claim paid out of the proceeds of the sale of the mortgaged premises, ahead of the mortgage indebtedness, it should allege and prove that the net income arising from the operation of the property by the receiver, after paying all necessary operating expenses, was applied to the betterment of the mortgaged property.

Fourteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that even if there had been such a diversion of the income arising from the current earnings of the railway company, or from the current earnings of the receiver, the amount of restoration depends upon the amount of diversion,

and before the Terminal Railway Association was entitled to have its claim paid out of either the income of the receivership or the proceeds of the sale of the mortgaged premises, it should have alleged and proved that the amount so diverted aggregated at least the amount of its claim.

Fifteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the income arising from the current earnings of the railway company was diverted from the payment of current expenses to the payment of the mortgage debt, principal or interest.

Sixteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the net income arising from the operation of the property by the receiver was diverted to the betterment of the mortgaged property.

Seventeenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the mortgage bondholders had received that which in equity belonged to the general creditors of the railway company.

Eighteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railway Association relied wholly, for its right of recovery, on the order appointing the receiver, directing him to pay certain claims; and in failing and refusing to decide that such order alone is not a sufficient ground of recovery.

Argument.

The questions presented by this application are: *First*, is this a proper case for the exercise of the power of this court in certiorari? If this is determined in the affirmative, then; *Second*, did the Court of Appeals for the Seventh Circuit err in denying to the petitioner a right of appeal? *Third*, is an unsecured creditor of an insolvent railway company entitled to priority over the mortgage bondholders, either in the income of the receivership, or the proceeds of the sale of the mortgaged premises, without alleging and proving a diversion of income?

FIRST.

This Is a Proper Case for the Issuing of a Writ of Certiorari.

The Act of Congress, approved March 3d, 1891, creating the Circuit Court of Appeals, expressly pro-

vided, by its Sixth Section, for a review by the Supreme Court, in the following language:

> "And excepting, also, that in any such case as herein before made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

In the very late case of *Forsyth vs. City of Hammond* (decided April 9th, 1897) the Supreme Court, in response to a contention of lack of power to take cases by certiorari, said of this section of the act that:

> "The general language of this clause is noticeable. It applies to every case in which, but for it, the decision of the Circuit Court of Appeals would be absolutely final, and authorizes the court to bring before it for review and determination the case so pending in the Circuit Court of Appeals, *and to exercise all the power and authority over it which this court would have in any case brought to it by appeal or writ of error.* Unquestionably the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. * * * * All that is essential is that there be a case pending in the Circuit Court of Appeals, and of those classes of cases in which the decision of that court is declared a finality, and this court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination."

Fully appreciating the fact that "a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the Act creating the Courts of Appeal," we shall endeavor to

show that the case at bar comes within the narrow limits early prescribed by the Supreme Court for the exercise of this power.

In *ex parte Lau Ow Bew, 141 U. S., 583*, this court announced that one of the grounds upon which it would exercise this power was in cases in which the question involved was one of gravity and importance. And in *Forsyth vs. City of Hammond, supra*, it said:

> "That while this power is co-extensive with *all possible necessities* and sufficient to secure to this court a *final control over the litigation in all the Courts of Appeal*, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, *the necessity of avoiding conflict between two or more Courts of Appeal*, or between Courts of Appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external rélations, demands such exercise."

The circumstances which we contend exist to warrant the exercise of this power, are (1) the importance of the question involved, and (2) the conflict of the decision in this case, with the decisions of the Courts of Appeals for the Fourth and Sixth Circuits.

(a) The importance of the questions involved justifies a review by this court.

The ground upon which the Court of Appeals dismissed the appeal involves a far-reaching question of practice, *i. e.*, the right of a receiver to appeal from a decree of the court which appointed him. It was contended by the receiver that this question was

definitely settled in favor of the right to appeal by the decision of the Supreme Court in the case of *Farlow vs. Kelly, 131 U. S. Append. c. c. i;* but this contention was not accepted by the Court of Appeals. If the Court of Appeals is right upon this point then the trial and intermediate courts have nothing but the principles of pleadings and practice to guide them in the disposition of such a question, since no other case in the Supreme Court can be found which touches the question.

It might be suggested that principles and not adjudication is the proper basis for a judgment, but on this very question we have a very natural result of a determination reached in that manner, *i. e.*, a conflict between the decisions of the only three Courts of Appeals to whom the matter has been submitted. It is, therefore, we contend that if the question is of sufficient importance, the very fact that the Supreme Court has never passed upon it is one of the most urgent reasons why the case should be certified to it for determination.

Is it of sufficient importance? Considered in relation to railway litigation alone it will be remembered that since 1893 eighty per cent. of the mileage of American railroads has been in the hands of receivers, and when a railroad is in the hands of a receiver its litigation tends rather to increase than to diminish. As to all questions save those arising directly between

the mortgagor and mortgagee, it has been the custom to refer them to the receiver appointed to conserve the property; in fact, the very nature of a receiver's duties demand that he shall protect his trust either by defense or prosecution; and this necessarily devolves upon the receiver a great mass of litigation. Is it not of the utmost importance then that the rules of practice governing such litigation should be definitely and authoritatively determined? We submit that if this was the only feature in the case it alone would justify the court in taking this case.

(b) The necessity for unanimity in the decisions of the various Courts of Appeals also justifies a review by this court.

In addition to the importance of the question involved, we have here a conflict in the decisions of the Courts of Appeals which has been recognized as a most potent reason for a review by this court. *Forsyth vs. City of Hammond, supra.*

In April 1894, the right of a receiver to appeal seems first to have been attacked in the Federal courts. This occurred in the Sixth Circuit, and is reported in the case of *Fellon vs. Ackerman, 9 C. C. A., 457, s. c. 61 Fed. Rep., 225.* There a receiver appealed from the order of the court by which he had been appointed, granted upon intervening petition, and restraining him from obstructing a road which the court found to have been improperly vacated. The court at once

held not only that it was consonant with the relations which ought to exist between a receiver and the court appointing him, but also that as the representative of the owners of the property he was temporarily in charge, justice demanded that he should be entitled to have the order of the court which affected their interests reviewed.

Following closely upon this decision, in point of time, we find the next attack in the Fourth Circuit, reported in *Thom vs. Pittard, 10 C. C. A. 352, s. c. 62 Fed. Red. 232*, decided the very next month—May, 1894. *This was also unsuccessful*, and we find these two circuits in harmony. Here the ground assigned was that the receiver was not in fact a party to the suit; had no interest in the disposition of the funds and property under his control, and therefore had no right to appeal from a decree disbursing or distributing the same.

In conflict with these two decisions of the Fourth and Sixth Circuit Courts of Appeals announcing a receiver's right to appeal, we have the decision of the Court of Appeals for the Seventh Circuit denying such right. It is true that in the opinion of the latter court it is asserted that it agrees with the Court of Appeals for the Fourth Circuit, *but we submit that its judgment in dismissing the appeal on the very ground that the receiver had no right to appeal is controlling*

as to whether the two decisions are in conflict. In one the appeal is *sustained*, and in the other it is *dismissed.*

SECOND.

A Receiver's Right to Appeal Is Sustained by Principle.

If this court is of the opinion that this case is a proper one for review, the question which then presents itself is, did the Court of Appeals err in dismissing the appeal? We submit that not only the weight of authority is against the conclusion reached by it, but also that such authority has for its foundation sound reasoning.

(a) A receiver is appointed to protect the estate for whomsoever may be ultimately entitled thereto.

Inasmuch as one of the grounds assigned by the Court of Appeals for dismissing the appeal was that the receiver has no interest in the controversy, it becomes important to ascertain what interest a receiver has in the estate he is temporarily in charge of, since the controversy in question grew out of an attempt to diminish and segregate that estate.

In the early case of *Fosdick vs. Schall, 99 U. S., 235*, this court announced:

> "He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court *proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.*"

Primarily, and of necessity, until the end of the original litigation, when it may be definitely ascertained which of the parties is entitled to the property, he is the representative of the estate. As betwen the parties to the original controversy, *i. e.*, the foreclosure of the mortgaged estate, he cannot be said to represent one as against the other, but he represents both.

This representative character is well expressed in *Booth vs. Clark, 17 Howard 322*, where it is said:

> "The receiver is an indifferent person between parties, appointed by the court to receive the rents, issues or profits of land or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. *Wyatt's Practice Reg., 355.* He is an officer of the court, his appointment is provisional. He is appointed in behalf of all parties, and not of the complainants or defendants only. He is appointed for the benefit of all parties who may establish rights in the cause."

As between the two original parties, mortgagor and mortgagee, he stands indifferent; but not so as to the two original parties on one side and a stranger (to the original action) on the other side, attempting to wrest a portion of the subject of the original controversy away from both the original parties. In such a conflict he represents the one of those original

parties who may be ultimately entitled to a prior right in the subject matter of controversy. *When this conflict is ended and the stranger is finally* adjudged to have a right prior to either of the original parties, then it may be said that another party has established a right in the controversy, and the receiver then represents also that party in any subsequent conflict with another stranger. And thus on, as strangers establish rights in the cause, the receiver becomes their representative. But we insist that *by the mere intervention in the original cause no right is established,* and that it is the duty of the receiver, as the custodian of the property, to defend against such assaults to the Court of last resort, and that no right is established until the demand is either admitted or finally adjudicated in a Court of last resort.

This distinction has been clearly recognized in the case of *McLeod vs. The City of New Albany, 66 Fed. Rep. 378,* where, in determining the matter presented on appeal, it was necessary for the court to define who a receiver represented in respect to the conservation of the property for which he was appointed. There the court held, at page 381, not that he represented *every* party who might come into the original cause *by intervention,* but that he represented the parties to the *original bill.*

(b) If any presumption is to be indulged as to which of the original parties the receiver represents, it is in favor of the mortgagee.

It is not to be overlooked that this receiver was appointed on a bill filed by the mortgagee to foreclose this estate, and therefore there is a great distinction between cases of this kind and cases where a receiver is appointed at the instance of the insolvent corporation itself, or to wind up the affairs of a corporation, or to dissolve a partnership. In the one case the court takes possession of the property through its receiver for the purpose of subjecting it to a decree of foreclosure and sale; in another case the court takes possession of the property for the purpose of keeping it intact so that it may the better discharge its public duties; in another case, the court takes possession of the property for the *very purpose* of dividing it between *all classes of creditors.*

Therefore, with this distinction in view, we submit that in a case of this kind where a stranger has intervened, if any presumption is to be indulged as to which of the original parties the receiver represents in a conflict with a stranger, the presumption is that he represents the mortgage bondholders. The very fact that a court will take possession of the estate is conclusive of the *prima facie* case thus made by the complainant in an action to foreclose its mortgage; so that, primarily, the court holds the property

through its receiver to satisfy the debt of the mortgagee, and as between the mortgagee and an unsecured creditor, it is certainly a mild presumption that the former is entitled to the estate which the receiver is conserving.

As between the mortgagor and mortgagee, this presumption is recognized in that class of cases in which it is held that until default or the actual possession of the estate by the mortgagee, through a receiver, the income of the property belongs to the mortgagor, to do with it as it sees fit. This warrants the strong presumption that after the mortgagee has moved and has, by the appointment of a receiver, subjected the estate to the forfeiture provided for in the mortgage, that *prima facie* at least, the income derived from the property by the receiver belongs to the mortgagee, and that the acts of the receiver in defending an assault upon such income are *prima facie* in the interest and for the benefit of the mortgagee.

(c) By intervention the appellee attempted to diminish the estate which the receiver was appointed to conserve.

By reference to the intervening petition (R. p. 26) it will be seen that the only prayer is that the receiver pay to the intervener a certain sum out of the income of the receivership. No one can question but that the receiver was appointed just as much for the

purpose of conserving the income as the *corpus* itself; the mortgagee claimed, under its bill of complaint, the income just as much as it claimed the *corpus*.

Then is not a proceeding, the only object of which is to obtain a portion of the income, an attempt on the part of the intervener to diminish the estate which the receiver is appointed to conserve? Is not this attempt to acquire a portion of the income just as much an attempt on the part of the stranger to divest the receiver of his possession of the estate as though the intervener had claimed a portion of the right of way upon which the railroad track was built? We submit that it is.

If it is the duty of a receiver to resist an attempt to divest him of certain portions of right of way, then, surely, it is as much the receiver's duty to resist this attempt to acquire a portion of this income. And we respectfully submit that in carrying such resistance to the Court of last resort the receiver does not make himself a partisan as between the real parties to the issue before the court in the cause in which he is appointed, viz., the foreclosure of the mortgage; but that he is doing all in his power to conserve the whole estate for whomsoever shall be ultimately entitled to it, and that thereby he is doing what was expressly approved in *McLeod vs. City of New Albany, 66 Fed. Rep,, 378*, viz., to contest the right of a

stranger to participate in this estate, and thus diminish it.

(d) His duty is to defend the estate against all claims which he deems to be unjust.

In the opinion rendered by the Court of Appeals in the case at bar it is said of the receiver that "*his duty is to defend the estate against all claims which he deems to be unjust.*" But in applying that principle to the case at bar the court seems to have misapprehended a most material fact, since it concluded, we think erroneously (Opinion p. 4),

> "That this debt was a just claim against the estate is not doubted *and is conceded.*"

The receiver admitted the claim to be just as against the *railway company*, but *expressly* denied it to be just as against the *estate*. This distinction is vital. To be just against the railway company it need only appear that the services were performed, the material furnished, and that the value was reasonable; but to be just against the estate *it must also appear that for the payment of this demand out of the estate the intervener must bring himself within the well defined limits prescribed by the Supreme Court.* The right of participation is the very right which the receiver has always denied, and his attitude in this respect throughout the whole litigation has been consistent.

When the intervention was first filed the receiver did not deny the claim as against the railway com-

pany, but asserted that even admitting all the facts alleged by the intervener, still it was not entitled to have its demand paid *out of the estate.* This was the substance of the receiver's answer. It was on the issue thus raised that the matter was submitted, first to the master and then to the Circuit Court. *No one then denied the receiver's right to resist this claim.* If he could resist it before the master and in the Circuit Court, *why can he not resist it in a Court of Review?*

This resistance is in the performance of his duty to defend the estate against all claims, and is in accord with one of the late decisions of the same Court of Appeals.

In *McLeod vs. The City of New Albany, 66 Fed. Rep., 378,* a case absolutely on all fours with this case, the Court of Appeals announced most emphatically not only that it was the duty of the receiver to preserve the estate, but that on an appeal from a decree of the lower court adjudging the claim of an unsecured creditor to be prior to that of the vested contract lien, *the receiver could not object that the original parties to the foreclosure clause were not parties to the appellate proceedings, because he, the receiver, represented them in the Appellate Court,* for the purpose of contesting the claim, and further, because the original parties were not in that Appellate Court objecting that they were not *well* represented.

The facts in the *McLeod case* are so nearly identical with the facts in the case at bar that we feel justified in here presenting an abstract.

McLeod was appointed receiver of the property of the Kentucky and Indiana Bridge Company in a suit brought against it and the trustees of its mortgage by the Youngstown Bridge Company. In this suit *an unsecured creditor*, the City of New Albany, filed its intervention for the payment of taxes accrued *prior to the receivership*, and prayed that the same be paid out of the funds in the hands of the receiver prior to the claim of any other creditor.

This intervention was referred to a master in chancery, who reported in favor of the unsecured creditor. The receiver excepted to this report, but his exceptions were overruled, the master's report confirmed, and the lower court entered a decree directing the receiver to pay the amount found due. From this decree the receiver appealed to the Seventh Circuit Court of Appeals.

Among other errors assigned was a defect of proper parties. The receiver urged not only that the mortgagee should have been made a party, but also all of the parties to the *original* suit. This contention presented fairly and squarely the question as to whether or not the receiver had sufficient interest, in a controversy between various creditors, claiming priority over each other, out of the estate for which he

was appointed to conserve, to present the matter for final determination to the Court of last resort; or whether or not it was necessary that the particular party whose lien was sought to be displaced should have been made a formal party to the intervening petition in the lower court, and have appealed from its decision, if the same displaced its lien. And in that case the court *decided that very question*, and not only held that it was the duty of the receiver to resist the payment of the taxes out of the estate which he was appointed to conserve, but went further and held that the receiver had sufficient interest in the matter *to fully represent on appeal the parties to the original cause*, whose vested lien the intervener was attempting to displace.

The language used by the court in arriving at the above conclusions (page 381) is:

> "The other parties whose presence is suggested as essential *are parties to the original bill* as holding incumbrances upon the property subordinate to the lien of the complainant. They were in court in the suit in which the receivers were appointed, and were bound to take notice of the intervening petition of the city filed in that suit, and of the proceedings thereunder. It was not necessary that they should be made formal parties to the petition. Being parties to the suit, they were in fact parties to the intervening petition. The receivers in respect to the conservation of this property *represent all parties to the original bill*. It was their duty to preserve the estate and thereto to pay the taxes thereon. If the taxes were illegally paid, it was their duty, representing all in interest, to contest payment. If parties to the original bill desired to take active part in such contest they had a right to be heard, and such right, if demand-

> ed, would doubtless have been accorded to them. They did not so ask, although being parties to the suit they were obligated to take notice of the proceedings. *They are not here objecting that they were not well represented by the receivers.* The latter cannot for the first time, after full hearing upon the merits before the master, object *that those they represented* should be formally notified of the petition."

If, therefore, as that court above holds, *that a receiver cannot object* that the parties whose lien the intervener seeks to postpone is not a *formal* party, upon what principle of justice *can the intervener* set up such a purely technical defense; if that court will not sustain the contention that the receiver does not represent all the parties to the original bill, *when made by the receiver*, why will it sustain the same contention *when made by an unsecured creditor?*

Can it be said that the claim of the City of New Albany for taxes in the *McLeod case* differs in character from the claim of the Terminal Railroad Association in the case at bar, for materials furnished? Both are unsecured creditors whose demands accrued prior to the receivership, and the intervening petitions of both seek a priority over the vested contract lien of the mortgagee, and seek payment of the same out of the estate in the hands of the receivers. Or is there such a difference even in degree, which would sustain the vital distinction that in the first case the receiver has sufficient interest in the estate to warrant his appealing from a decree which would diminish that

estate, *and in so appealing he represents all of the parties to the original bill*, while in the latter case he has neither the interest nor represents the parties to the original bill, who claim to be ultimately entitled to the estate he was appointed to protect?

We now beg respectfully to direct the court's attention to a number of cases in which that Court of Appeals has clearly recognized and sanctioned this very receiver's right to appeal from an order of the lower court, which diminished the estate he was appointed to protect, *and which declared "the respective equities of the parties to the suit," as that term is applied in the opinion in this case.*

Mather Humane Transportation Co. vs. Anderson, 76 Fed. Rep., 164, arose in this very foreclosure suit; the lower court entered a decree disallowing intervener a priority over the mortgage lien for car rentals; from this decree intervener appealed to that Court of Appeals, *making only the receiver appellee.* In disposing of the case this court permitted the receivers to resist intervener's right to priority and sustained their contention in that regard. *No other parties were before the court.*

Hook vs. Bosworth, 64 Fed. Rep., 443, was also a controversy which grew out of this same foreclosure proceeding. In that case Mr. Justice Jenkins, speaking for the Court of Appeals, even went so far as to

hold that Bosworth represented *solely* the trustee of the bondholders in a litigation which sought to subject certain earnings of the defendant railway company, which accrued prior to the appointment of the receiver, to the lien of the mortgagee. In view of the fact that the receiver there contended that he not only represented the bondholders, but also the general creditors of the company, this holding becomes more significant, inasmuch as the court, to prevent the recovery of those prior earnings by the receiver, based its conclusion that the receiver represented *only the trustee*, on the fact that he did not represent the general or unsecured creditors; and so in the very beginning of the litigation arising out of this foreclosure, the Court of Appeals emphatically and unqualifidely indicated to this receiver that he represented the trustee of the bondholders, and no one else.

There, William S. Hook and Marcus Hook, as officers of the railway company, after the receiver had been appointed, collected moneys from the Federal Government for the transportation of mails by the railway company. The receiver, conceiving himself to represent both the secured and unsecured creditors, and the money to be a part of the estate for which he was appointed to conserve, filed a petition against the Hooks to recover the same. The lower court sustained the receiver's position, but was reversed by

this court on the theory that the receiver *represented solely the trustee*, as is shown by the following language from the opinion at page 449:

> "So that the complainant trustee, *or the receivers as its representatives*, have no right to the earnings prior to the filing of this bill. * * * * What right the receivers would have to the fund earned prior to the filing of the bill, *if they represented judgment creditors*, we do not find it necessary to determine. As we have before observed, the record discloses that certain intervening petitions, cross-petitions and bills (some of them filed in the cause of the Mercantile Trust Company against the St. Louis & Chicago Railway Company, of the nature of which suit we are not informed) were ordered to be consolidated with the principal cause for the foreclosure of the trust deed or mortgage. The record is wholly silent with respect to the nature of those petitions, cross-petitions and bills, and to the character which the petitioners, cross-petitioners and complainants therein assumed. We are only told that those proceedings. whatever they were, were consolidated with the principal suit. * * * *We are, therefore, unable to say that the appellees (receivers) represent creditors as well as the trustees.* We can not, therefore, adopt the suggestion of counsel that these intervening petitions, etc., represent 'labor, supply and traffic balance creditors.' The fact does not appear from the record. We cannot assume it.
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> * * * * * * * * *
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> "It would seem inequitable, under such circumstances, that they should be called upon to respond to the receivers for the amount so paid, *unless possibly* it might be claimed that *they had no right*, after the appointment of receivers, to receive or to so disburse the monies *as against representatives of creditors*, appropriating it wholly to the payments of debts of their selection, when the debts discharged had only right to share ratably with other indebtedness of the corporation. *We are*, however, from this record, *unable to regard these receivers as representatives of others than the trustees of the mortgage*, who is not entitled to the earnings prior to the receivership."

Can it be said that the position in which the Court of Appeals thus placed the receiver at the beginning

of the litigation which arose out of this foreclosure, is in harmony with the position it assigns to him in the case at bar? If not, can it be said that circumstances have arisen which warrant such a radical change? We respectfully submit that as far as the conditions appear from this record they are identical in every detail as those which were disclosed by the record in *Hook vs. Bosworth, supra*, and although that court may personally have known that a sale and transfer of the property had taken place, we submit that this case should be decided on the record just as *Hook vs. Bosworth* was. *There the Court said it would not take the suggestion of counsel as to any fact which did not appear in the record*—that it could not "assume it." *And for the reason that certain facts did not appear in the record, it there held the receiver to represent solely the mortgagee.*

If the right of the interventer has been fortified by proceedings subsequent to the filing of its petition, and the record does not contain the same, it is the duty of the intervener to suggest a diminution of the record. The Court cannot assume it.

(*Distilling Co. vs. McNulta, 77 Fed. Rep., 415.*)

Another case in which that court recognized and sanctioned the receiver's right to resist to the Court of last resort, the effort of an unsecured creditor to displace the vested lien of the mortgagee, is *Bosworth vs. National Bank, 64 Fed. Rep., 615.* In that case the

bank filed its intervening petition in the foreclosure cause, alleging an indebtedness to it by the railway company of $10,000, upon which $2,500 had been paid in cash, and the balance by two drafts drawn on a traffic balance due from another railroad; that the payment of these drafts had been stopped by the receiver, and thereupon prayed an order directing the receiver to pay the same. The Court of Appeals says:

> "The claim on the part of the bank is that the drawing of the drafts constituted an appropriation in equity to that extent of the said funds in the hands of the drawee, which gave the bank a lien thereon *pro tanto* in *preference to other creditors*, although said drafts were never accepted or paid by the drawee."

So it is, therefore, to be seen that in that case also, we have a stranger to the original bill intervening in the cause, and claiming the right to have his debts paid out of the estate in the hands of the receiver, ahead of all other creditors. The receiver, while not questioning the validity of the debt as against the railway company, considered it his duty to resist the payment out of the estate in his hands. His position is thus stated by the Court of Appeals:

> "The contention on the part of the receivers is that inasmuch as the drafts were not presented or accepted, or the money paid before the railway went into the hands of receivers, and the money was then paid over to the receivers on demand, no lien attached to the money in the hands of the drawee, and that the receivers hold it as trustees for the benefit of the railway company and its general creditors."

The Circuit Court sustained the contention of the bank, viz.: that it had a lien prior to all other creditors, and directed the receivers to pay it $7,500 out of the estate in their hands. Was not this a decree distributing the assets of the insolvent corporation between conflicting creditors and giving one a right prior to all others? Yet from this decree the receivers appealed, and the Court of Appeals not only sustained the appeal, but went further and maintained the position that the receivers represented the bondholders, the railway company and all other creditors *as against this particular creditor*, and reversed the decree of the lower court, directing it to enter one in favor of the receivers. The Court says (page 618):

> "The receivers stand in the place of the administrator in the Massachusetts case, *and represented not only* an insolvent debtor, but *all* of its creditors as well, whose rights attached to the fund upon their appointment, and before any appropriation of the portion thereof represented by the drafts had been effected by presentation or acceptance, and even before the fund became due and payable by agreement of the railway companies."

So it appears from these two decisions of this Court of Appeals (*Hook vs. Bosworth* and *Bosworth vs. Bank*) that *it is immaterial whether a receiver represents only the mortgage trustee, or all creditors, secured or unsecured, and that in either event it is his right and duty* for the preservation of the estate in his hands for whomsoever may be ultimately entitled thereto *to resist the diminishing of that estate* by the payment to a general creditor in priority over all other creditors.

Passing now to the next case in which this Court of Appeals has recognized and sanctioned this receiver's right to appeal from an order of the court appointing him, which directs the distribution of the assets of the insolvent corporation, we come to *Bosworth vs. Francis Hook.* The opinion in this case was handed down in January, 1897, and reported in *77 Fed. Rep., 686.* In that case Francis Hook filed her intervening petition in the original foreclosure cause, alleging that the receivers had taken possession of one hundred gondola cars, upon which she had a lien prior to all other creditors, securing the payment of a promisory note of the railway company for $11,070 held by her. The petitioner prayed the payment of this amount out of the estate in the hands of the receiver, or in default, for the surrender of these particular cars, which were also in the hands of the receiver.

On these facts, we again submit that that case also was an attempt on the part of one creditor to obtain a priority over other creditors of the estate, and that when the Circuit Court entered its decree directing the receiver to pay the intervener the amount in question, out of the funds in his hands, within a specified time, that such was a "decree declaring the respective equities of the parties to the suit," *not the parties to the original suit,* but parties to the suit *as that term is used and applied in the opinion (p. 4) of the Court of Appeals in the present case.* Again in that case, the re-

ceiver felt it was his duty to take the judgment of the Court of last resort, and so he prayed and perfected an appeal from the order which thus diminished the estate and directed him to part with a portion of it.

Did this Court of Appeals in that case say to the receiver that he had no right to appeal from that order; that he was as much a representative of Francis Hook as of the mortgagee; that he should, as between these two parties, be indifferent and not a partisan; that his duty was to all in common, that he should not become the advocate of one against the other? No such position was there taken by the Court; but, on the contrary, the Court of Appeals again not only sanctioned the receiver's appeal, *but upon it alone*, reversed the lower court and directed it to enter a decree dismissing the intervening petition.

If this right to appeal had not been declared by other courts, we submit that its recognition by this Court of Appeals in all the litigation which has heretofore grown out of this particular foreclosure proceeding is full justification of the continuance of that practice in this particular Court by this receiver under the advice of his counsel.

(e) Is not the demand of an unsecured creditor for priority just as much a claim asserted against the whole estate as one growing out of the negligence of a receiver?

In distinguishing this case from *Thom vs. Pittard, 8 U. S. App. 597*, the Court of Appeals in its opinion (p. 3) says:

> "This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend a claim asserted."

That was a case in which an employee of the receiver sued him for a personal injury and recovered a judgment, from which the receiver appealed. The argument against the right to appeal in that case is identical with the arguments of opposing counsel in this case. We submit that in attempting to compel the receiver to respond in damages for the injuries sustained, *the employee was not asserting a demand which was in any sense more* against the whole estate, than an intervener who seeks to have his unsecured debt paid out of the estate in the hands of a receiver. *Prima facie*, that estate, both the *res* and the income, belong to the mortgagee, and any decree or judgment which directs the receiver to pay money out of it diminishes it to that extent, and the estate, as a whole, is just as much interested in defending against one claim as against the other.

The claimants in both instances are strangers to the original litigation and both seek to diminish, to the extent of their claims, the subject matter of the original controversy. If it is not necessary for the parties to the original controversy to appeal from the demand of one, upon what theory should they be compelled to appeal from the demand of the other? Both are seeking to particpate in the estate which the re ceiver has undertaken to preserve for the application of the decree which shall be entered on the determination of the issues made between the parties to original bill, *not on any issue which may be raised by the claim of some stranger to participate in the estate.*

(f) The Court Appointing the Receiver Made Him the Guardian of the Interests of Whomsoever Should be Ultimately Entitled to the Estate.

At page 4 of the opinion the Court of Appeals says that neither the trustee, bondholders nor purchasers are in court objecting, and therefore asks who made the receiver guardian of their interests. Our reply is that when the bondholders, through their trustees, filed their bill to foreclose a certain mortgage, they represented to the Circuit Court, that by virtue of a certain contract they were entitled to have all of the property of the railway company sold to pay their certain indebtedness. The issues raised by this claim could not be determined at once, and for the purpose

of preserving that property, so that if the court found the issues for the bondholders, this property would be in its possession to sell for their benefit; and so that also if the court found the claim of the bondholders was not sustained, it could restore the property to the company. It was, therefore, that the court entered an order directing the receiver to take possession of this property and, *primarily*, to preserve it for whosoever should be ultimately entitled to it, as would follow from a determination of the issues raised on the bill and answer.

(g) In appealing from an order which diminishes the estate the receiver is not necessarily solely asserting the right of one creditor over another.

The theory upon which this receiver did appeal in this case, and in all of the cases arising out of this foreclosure above referred to, is that it was his duty to preserve the estate as against all strangers to the *original controversy*, and that as to the equity of any decree which was entered on an intervening petition directing him to part with a portion of that estate, he should have the judgment of the court of last resort. As to any controversy between the parties to the original bill he had no interest; *but as to a controversy between a stranger to the cause and the estate*, he had a well defined interest, and was in duty bound to resist to the utmost the assertion of any claim which

would diminish that estate. And we earnestly contend that the fact that the stranger, attempting to get possession of a portion of the estate, happens to be an unsecured creditor, and bases his demand on some equity supposed to be prior to that of the original parties, does not necessarily make the action of the receiver, in defending the estate, the assertion of the right of one creditor over another.

(h) He is simply asserting the right of the estate not to be subject to the demand made against it.

When the receiver appeals from an order which subjects the estate to the satisfaction of any demand, we submit that the manifest weight of authority is conclusive that he comes to the Court of Appeals as the representative of no particular party, *but of the estate*, and in asking the judgment of the Court of Appeals he is asserting the right *not of a party*, but of the estate for the benefit of whomsoever may be ultimately entitled thereto.

This position is adopted by the Court of Appeals when it says of him in this case (opinion, p. 4) that:

> "He has the right to appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate."

If this is so, then upon what ground was this appeal dismissed? Was it upon the ground that the demand of the intervener is not a claim against the estate?

(i) The claim of the intervener is one asserted solely against the estate.

Can it be seriously contended for one moment that the claim of the Terminal Railroad Association is not one which is asserted against this estate, and *asserted solely against the estate?* In the intervening petition no relief is prayed against the railway company; no relief is prayed against the bondholders, nor the trustee, nor any other creditor; *but the form and substance of the demand is against the estate solely.* The intervening petition seeks no priority over other creditors; it simply asks the court to give it a portion of the estate *and ignores all parties.* (R. p. 26.)

(j) This right to appeal is announced by the two leading text writers on receivers.

At section *264 of High on Receivers*, a text writer who for years has been recognized by the courts of this country as eminent authority on that subject, we find the following:

> "It is held in actions against receivers in their official capacity that they cannot, either expressly or impliedly, waive any legal or equitable defense on which their principal might have relied had the action been brought against him. Receivers of an insurance company cannot, therefore, in an action brought against them to recover upon a policy of insurance issued by the company, waive or dispense with the conditions of the policy as to notice of loss. And although leave may be granted to sue a receiver, he is at liberty to assert any defense which he may have to the action, either by plea, answer or demurrer, *and he has the same right to appeal from an ad-*

verse judgment for the recovery of funds pertaining to this receivership, as the party over whom he was appointed would have had."

On this same subject we find that *Beach*, the other well recognized authority on receivers, at *section 716*, says:

"Every claim presented against a fund in the hands of a receiver, if contested before the court, *becomes in effect a suit against the receiver*, which is ended by final judgment allowing or rejecting the claim, and any party to the contest dissatisfied with the result, may have the proceedings reviewed on appeal. *The receiver, as a party defendant to the action, has the same right to appeal from a judgment of the court affecting the interests of the estate represented by him*, that the party or corporation to whom the estate originally belonged would have had if the suit had been brought against them."

(k) An appeal by a receiver may be a meritorous rather than a censurable act.

High on Receivers, at section 207, says:

"It is important to observe that the general doctrine of courts of equity, recognizing a receiver as the officer or representative of the court from which he derives his appointment, *is not to be understood as limiting or restricting his rights in the management of a suit which he has once undertaken*. And after entering upon the litigation, he is regarded as being entitled to all the freedom of action of any other person, *and the fact that he appeals from a decision which is adverse to him is not of itself evidence of bad faith, or mismanagement of his trust, and may be a meritorious rather than a censurable act.*"

THIRD.

This Action Should Be Determined Upon the Record.

In its opinion at page 4 the Court of Appeals assumes that the estate has passed out of the hands of the receiver since this intervening petition was filed, as it says:

> "The record here is not complete. There has been brought to this Court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from the railway had been sold under decree of sale, and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand any moneys with which to pay the debt adjudged."

We are unable to say how much the conclusion of the Court is based upon the foregoing assumption of facts which do not appear of record. But it is safe to say that that Court would not have inserted the same in its opinion, if it in no way affected its conclusion. We, therefore, feel justified in calling attention to the well-satisfied principle that a court of review in determining any question presented to it will confine itself strictly to the record before it. It is true that those matters were not denied by counsel at the argument, but this Court in *Hook vs. Bosworth, supra.*, said that

although counsel suggested certain facts, yet nevertheless, as they did not appear of record, it could not *assume them to be facts.*

Again, all of these facts assumed by the Court of Appeals must have occurred subsequent to the filing of the intervening petition, and that court has held in *Empire Distilling Company vs. McNulta, 77 Fed. Rep., 700*, that while a petition of intervention need not be as formal as a bill of complaint, yet it should contain all the material facts relied on, and embodying by recital or reference, *so much of the record in the original suit as is essential*; and that proceedings taken in that original suit, after the filing of the petition which woud fortify the right of the intervener, should he incorporated in the petition by amendment, *and if this is not done such proceedings cannot be noticed by an appellate court*, inasmuch as those subsequent proceedings are not properly brought before it on appeal.

The justice of this is at once apparent, for when the subsequent proceedings are made a part of the record, and one party asserts its intention of relying thereon, the other party has an opportunity of meeting in a formal and orderly manner the contentions asserted by the opposing party on account of said subsequent proceedings.

The conclusion which, it is apparent, the Court of Appeals based upon this premise of facts, not disclosed by the record, is found in the following language (Op. p. 5):

> "By what authority may he assert the rights of a purchaser? *By what right does he undertake to prevent the enforcement of this claim against the purchased estate*, presumably by the decree of sale, charged as a lien upon it? He has no such right. He is, in so doing, an interloper, obtruding himself in breach of his duty where he has no right, and in a matter in which he is not concerned, and to sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has not the right to interfere."

We submit that this conclusion of the court can be based upon no other premise than the assumption of facts not in this record, viz: *that the only interested party is the purchaser at the foreclosure sale.*

FOURTH.

The Decisions of the State Courts, Relied on by Interventor, Are Based on Facts Not Found in This Record.

In the Court of Appeals, counsel for intervener cited decisions from State courts in support of the proposition that a receiver has not the right of appeal. We have made a brief abstract of those cases for the purpose of showing that the conclusions

reached by those courts are based on a condition of affairs wholly different from that disclosed by the record in this case; and for that reason submit that they have no application to the case at bar.

The court will find, not only that the proceedings, in which those receivers were appointed, were for the dissolution of corporations and the winding up of the affairs of individuals, partnerships and lunatics, but that the receivers were appointed in the first instance for the express purpose of conserving the estate for the benefit of *all* creditors, secured and unsecured, and for the distribution of such estate between them, *pro rata.*

The Court will also find that in two of the citations the receiver's appeal was dismissed on the ground that *he was attempting to offset a claim of his own against the trust estate*, and that the quotation from *Thompson on Corporations*, in which he so positively asserts that receivers have no right of appeal in matters concerning the distribution of the estate, *is based solely on those two cases.*

In *Herrick vs. Miller, 123 Ind., 305*, it appears that Herrick was appointed receiver after a decree of sale had been entered in a suit to foreclose a real estate mortgage. He was appointed for the express purpose of receiving the rents and profits pending the sale and during the year of redemption. The receiver reported

to the Court that up to the date of sale the rents collected amounted to $17.23, claiming credits for $12.40. The Court refused to approve this report, and the receiver then filed another showing in addition, rents collected during the year for redemption to be $92.12. Miller, the complainant in the foreclosure, filed a motion for an order on the receiver to pay the amount over to him. The receiver resisted this motion on the ground that he had bought the property after the foreclosure, and was therefore entitled to the profits earned by the land during the year for redemption. The Court sustained the motion of Miller, and required the receiver to pay over the money. From this the receiver appealed. The real ground upon which that appeal was dismissed is found in the following language of the Court:

> "When ordered to pay the money to any particular person he will not be allowed to offset a claim due to him personally, since to allow this would render the disposition of the money as uncertain as before the receiver's appointment, and would defeat the very object of his appointment."

In that case there was no question as to the priority of rival creditors of an insolvent, to the estate; the real question was whether a receiver could become a purchaser of property pertaining to his trust, and could offset his claim in that behalf against complainant. Everything said by the Court not necessary to that determination is *obiter dicta.*

Stanton vs. Andrews, 18 Ill., App. 552, originated in an intervention filed by Andrews in a creditor's suit. It appeared that all the funds that could be realized from the insolvent judgment debtor had been distributed in pursuance of a stipulation entered into by all the parties interested.

The claim of Andrews was for royalties accruing on work finished by the receiver. The receiver joined issue and on hearing the master found in favor of the petitioner, but his report was overruled by the court, on the sole ground that petitioner should have sued at law instead of intervening in the creditors' suit. From this decree the intervener appealed and in reversing the lower court, the Supreme Court not only sustained the remedy pursued, but also affirmed the claim.

It was then, after the petitioners' right to the amount claimed had been sustained by the higher court, and by agreement of all creditors and parties in interest, a sum had been set apart for satisfying the claim, that the receiver refused to pay it.

The only ground upon which the receiver based his right to contest the allowance was, an order which the lower court entered while the case was pending on the first appeal, setting aside a certain sum to satisfy petitioner's claim, and *providing that the receiver should retain the residue, if any, as additional compensation for his services.*

The court says:

> "It is apparent to us that this action on his part is dictated by that provision of the order of January 4th, 1896, which constructively *gave the receiver a contingent interest* in the sixteen hundred dollars set apart for appellee's claim. We cannot but regard that part of the order as injudicious. It placed the receiver in a position where *his interest was in direct conflict with his duty.*"

So it will be seen that the controlling question in this case was the same as that in *Herrick vs. Miller*, *supra*, viz: that the receiver could not assert a personal claim to the trust property. And in addition we find that the court had marshalled the assets of the insolvent.

Section 6941 of Thompson on Corp. is based *solely* on the two foregoing cases, and is therefore entitled to no more weight, nor to be decisive of any other principle, than they are.

In *3 Md. Ch.* (*Re Colvin*) *278*, a Chancery Court appointed a Committee for a Lunatic. Shortly afterwards the Lunatic died and the court appointed a receiver to take charge of her property pending a litigation over her will. Later on the Orphans' Court appointed an administrator, and the question was, who was entitled to the possession of the property. There was no question of the receiver appealing from any order, distributing the assets in his hands, between rival claimants.

In *Chicago Title and Trust Company vs. Caldwell, 58 Ills. App. 219,* the express object of the original bill was to dissolve an insolvent corporation and distribute its assets *pro rata* among its creditors. The lower court ordered the claim of Caldwell to be allowed against the estate for $850.

> "To be paid *pro rata* with the claims of general creditors, and that the receiver pay to said Caldwell as dividends upon said sum the same percentage thereof as paid upon other claims of unsecured creditors."

The case of *Strauss vs. Carolina Interstate B. & L. Association* we do not find reported at *24 S. E. Rep. 740,* as cited by appellee, and therefore cannot state with accuracy the nature of the proceeding.

Beverly vs. Brooke, 4 Gratt. 208, also appears to be a controversy in which the court was administering the property for the benefit of *all creditors,* and involved no question of a receiver's right to appeal from an order distributing the assets between rival creditors.

In *People vs. Security Life Insurance Company, 79 N. Y. 267,* it appeared that the receiver obtained an order requiring all creditors of the insolvent corporation to exhibit their claims within a specified time. Before the expiration of the time, he addressed a circular to the policy holders to the effect that policies in force on the books of the company would be allowed without subjecting their holders to further

proof; mislead by such circulars the holders did not make further proof of their claim. These were objected to by other creditors, and were accordingly rejected by the referee, to whom the cause was referred to take proof *as to distribution of the assets.* But before any dividend had been made the receiver applied for and obtained an order giving two months further time within which such claims could be presented and established before the referee.

On this state of facts the court says:

> "The learned counsel for the appellants contends that the receiver has no standing in court; that he can be heard only as to his fees and compensation, and had no right to be heard upon the motion which resulted in the order appealed from; and, second, that the court itself had no power to grant the order. *Upon both questions we think he is in error.* Since the receiver is an officer, or as he is sometimes called, 'the hand' of the court, *it would be singular if he could not at any time go to it* with his complaint, *or for instructions in regard to any matter touching the fund placed in his custody, and more especially when,* as in the case before us, *it is in danger,* through his own error, *of being unfairly distributed.* He is not to advocate the cause of one claimant as against another—between them he is indifferent, owing a like duty to all, *and for that very reason* should, as far as possible, see to it that each has an equal opportunity to enforce his claim. *He stands as their representative and is bound to give them reasonable aid.*"

It is not to be forgotten that the above case was cited by intervener to support its contention that a receiver has no right of appeal, and we submit that it sustains the contrary.

Dorsey vs. Seibert, 93 Ala., 312, comes nearer presenting a state of facts similar to the case at bar.

But there is this vital distinction; first, it was a suit by a *general creditor* against the railway company, and therefore the funds arising from its operation *belonged prima facie* to general creditors who might intervene; second, the particular creditors did not intervene until after the property was sold, title made, and proceeds placed in the hands of the receiver for distribution.

It is hardly necessary to say that nothing was further from the mind of counsel than to trouble the Court of Appeals with mere moot questions. *Thom vs. Pittard*, in the light of *Farlow vs. Kelly*, to say nothing of the support found upon full review herein of text writers and adjudicated cases, seem ample justification for the appeal itself in the name of the receiver; and if a receiver's rights in the management of a suit are to be restricted by his being construed as the "hand," and the court which appoints him, as the "head," it follows that "if the order granting the appeal should be treated as permission to appeal," then there is no rebellion of the hand against the head.

In conclusion we, therefore, submit that the weight of authority sustains our contention that in cases in which the courts have taken possession of railroad property upon the application of a mortgagee seeking to foreclose its mortgage, the receiver represents no party but the estate itself, and that it is his duty to resist every attempt on the part of a stranger to diminish the same by depriving him of any portion of

it, and that to retain the fullest possession he has the right to present to the court of last resort for review any decree made by the lower court.

Again, that the repeated recognitions, and sanctions, by this Court of Appeals of this particular receiver's right to appeal, in this particular forecloseure proceeding, justified his appeal in this particular case.

FIFTH.

Before an Unsecured Creditor can Displace a Vested Mortgage Lien, He must Bring Himself Within the Well Defined Rules Laid Down by the Supreme Court.

We contended in the Circuit Court, and in the Court of Appeals, that the intervener was not entitled to a priority in this case, for the reason that there had been no diversion of the current earnings of the railway company, nor a diversion of the income of the receivership, to the benefit of the mortgage bondholders. In fact, the intervener did not rely on such diversion for its right, but rested wholly on the provision in the order appointing the receivers, directing them to make certain payments. This order created no vested right, and each demand must stand or fall on its own merits. From a hasty review of the decisions touching this question, the rights of the parties might not appear to be settled on a definite basis;

but from a thorough analysis of the cases it will clearly appear that the Courts have acted on well defined equitable principles.

(a) The rule giving certain unsecured claims priority over a mortgage lien is founded on diversion.

The practice of postponing the lien of a mortgage on railroad property to the payment of certain unsecured creditors most probably originated in the Seventh Circuit of the Federal Courts. At least it was in that Circuit that such practice first received judicial sanction, after being contested. In its inception this was considered nothing more than a "policy," and not until March, 1879, when the Supreme Court of the United States rendered the decision in the case of *Fosdick vs. Schall,* did it even attain the dignity of a "rule." Since then it has gradually evolved into a doctrine, the general principles of which are now firmly grafted into our equity jurisprudence, although many of the details as to pleading and practice remain to be announced by the Court.

As a policy it has obtained in some jurisdictions since as early as 1850, but merely by sufferance or consent of interested parties. The early history of the financial embarrassments of railroads shows that after being in the hands of a receiver for a short period they were usually turned back to the company,

and through the protection of the Court a foreclosure was actually avoided. Under such circumstances the payment of unsecured creditors worked no hardship to the mortgagees, but materially enhanced the value of their securities, and they had neither reason nor desire to attack the policy.

Later on in the era of railroading, when competition became greater, and success harder to attain, it appeared that such corporations could not recoup their financial standing by merely going into the hands of a receiver; but instead it began to mean a foreclosure, sale, and reorganization. Then it was that the interest of mortgagees began to be affected, and to protect that interest they were compelled to attack this policy.

The first written opinion rendered on this question to be found in the books, is recorded in *8 Bissell, 315*, decided in 1878, wherein Judge Drummond stated the grounds upon which he had sustained the "practice."

It will be seen that in this very first case, (*Turner vs. Indianapolis Railway*), while the right to displace mortgage liens is rested on the general powers vested in the discretion of a chancellor, yet one of the most potent, and the most logical reason for exercising it, is based on the fact that:

> "It was found in many cases that those who had control of the railways, instead of paying the current operating expenses of the companies, would postpone the payment of the same, sometimes for many months, in favor of the interest due on the mortgages, which they would

> discharge, in the hope, apparently, that a more favorable time in the business of the roads would enable them to make up the deficiency."

We have quoted from this case, because it is of no little significance, that in the very origin of this practice is to be found that condition of facts, which we contend should be averred and proved before this doctrine can be applied.

(b) In the illustrative cases diversion is made the test.

In the classification of these decisions, the case of *Fosdick vs. Schall, 99 U. S., 235,* has been often cited as the pioneer, presumably because it is the first recognition of this practice as a doctrine by the Supreme Court, yet, in view of the earlier case of *Turner vs. Indianapolis, Bloomington & Western, supra,* which manifested the existence of the doctrine as a policy, many years prior, we feel justified in classifying *Fosdick vs. Schall* as illustrative. And in this connection it is a curious fact, that although universally cited by claimants in support of their right to displace mortgage liens, the court in this case refused just such relief, because the facts before it would not warrant the application of the doctrine.

Now in this first illustrative case we find that the Supreme Court has selected, from the many reasons assigned by the Circuit Court in *Turner vs. Indianapolis, Bloomington & Western, supra,* the single test

of "diversion," as necessary to be established by the facts and circumstances of each particular case. This is shown in the following language:

> "The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debt for labor, supplies, equipment and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, *are kept from those to whom in equity they belong, and used to pay the mortgage debt.* The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order *that what is due from the earnings to the current debt shall be paid by the court* from the future current receipts before anything derived from that source goes to the mortgagees."
>
> * * * * * * * * * * * *
>
> "We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional equipment provided, or lasting and valuable improvements made *out of earnings which ought in equity to have been employed to keep down debt for labor, supplies and the like,* it is within the power of the court to use the income of the receivership to discharge the obligations which, *but for the diversion of funds,* would have been paid in the ordinary

course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; *and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts,* so use the income which comes into its own hands as, if practicable, to *restore the parties to their original equitable rights.*"

* * * * * * * * * * * *

"No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act."

"*The power rests upon the fact,* that in the administration of the affairs of the company *the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to the restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restortion; and that the amount of restoration should be made to depend upon the amount of the diversion.* If in the exercise of this power errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well settled rules of equity jurisprudence to the facts of the case, as established by the evidence."

In the case of *Union Trust Company vs. Souther, 107 U. S. 591,* is to be found another form of diversion which illustrates the fact that no "fixed and inflexible rule has been laid down for the government of courts in all cases," but it is sufficient, yet imperative, that it be shown that the money which should go to the general creditors has been *diverted* to the benefit of the mortgagees. In that case the Court said:

"The income of the receivership, instead of being applied in accordance with the order to pay the debts for the supplies and labor, was used with the consent and, it may fairly be inferred, at the request of the bondholders, to buy additional grounds, rolling stock, etc., and to make permanent improvements, thus adding to the value of the property; which was afterwards sold. There is nothing whatever to indicate that in thus using the income it was the intention of the Court to revoke the original order. It seems to have been found, in the administration of the cause, that by using the income to add to the value of the fixed property, the interests of all parties would be promoted, *and so the fund which in equity belonged to the labor and supply creditors, was for the time being diverted from them and put into improvements and additions, the proceeds of which are now in Court.* It is not to be presumed that this diversion would have been athorized if the value of the property added to and improved was not to correspondingly increase. Clearly therefore, on the face of the transaction, the fund in Court represents in equity *the income which belongs to the labor and supply creditors, as well as the mortgage security,* and there was no impropriety in appropriating it as far as necessary to pay the creditors specially provided for when the receiver was appointed. Such a practice, under proper circumstances, was approved in *Fosdick vs. Schall, ubi supra,* and seems to be eminently just."

In the case of *Wood vs. Trust Company, 128 U. S., 416,* the necessity of showing the diversion is most strongly stated in the following language:

"The argument is unsound. There are several answers to it. First, it overlooks the vital distinction between a debt for construction, and one for operating expenses. The doctrine of *Fosdick vs. Schall* is applicable wholly to the latter class of liabilities. * * * Secondly, it overlooks the important fact that the doctrine only applies where there is a diversion of the income of a 'going concern' from the purpose to which that income is equitably and primarily devoted, viz: the payment of operating expenses of the concern. In other words, the income must be first devoted to the expense of producing

> the income. In this case it is not pretended that the money used in paying the 117 coupons in question was income of the water works company."

Again, in *Burnham vs. Bowen, 111 U. S., 776, it was contended on behalf of the bondholders that* "no part of the income before the appointment of the receiver, was used to pay mortgage interest or to put permanent improvements on the property, or to increase the equipment, there was no such diversion of the funds, belonging in equity to the labor and supply creditors, as to make it proper to use the income of the receivership to pay them." And before the Court decided that the vested lien could be displaced, *it found there had been such a "diversion."* The Court there said:

> "When, therefore, the Court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, *there was such a diversion of what is denominated in Fosdick vs. Schall the "current debt fund," as* to make it proper to require the mortgagees to pay it back."
>
> * * * * * * * * * * * * *
>
> "We do not now hold any more than we did in *Fosdick vs. Schall, or Huidekoper vs. Locomotive Works, 99 U. S., 260,* that the income of a railroad in the hands of a receiver, for the benefit of the mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. *All we then decided, and all we now decide is, that if the current earnings are used for the benefit of the mortgage creditors before current expenses are paid,* the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In the case of *Farmers' Loan and Trust Company vs. Green Bay Railway, 45 Fed. Rep., 664*, it was sought to postpone the lien of the mortgage in favor of a claim against the railway company for causing death of petitioner's intestate. There Mr. Justice Jenkins, in disallowing the claim, stated the principle as follows:

> "The principle upon which equity acts in disallowing certain claims, priority of payment over precedent mortgage in the case of railways is settled by repeated adjudication of the Supreme Court. The gross income arising from the operation of a railway should be first applied to the payment of the expense of operation, proper equipment, and needful improvements. If the income be diverted to the payment of bonded interests, in disregard to the payment of such expenses, there should be restoration to original equitable right. Failing diversion, there can be no restoration. The amount of restoration is dependent upon the amount of diversion. The power rests upon the fact of diverson of a fund belonging in equity to the general creditors, or some of them."

In the case of *American Loan and Trust Company vs. Railroad Company, 46 Fed. Rep., 101*, in disallowing a claim for construction, the court, at page 104, said:

> "Finally in the case of *Wood vs. Deposit Company, 128 U. S., 421*, the Supreme Court expressly declares that 'the doctrine of *Fosdick vs. Schall* is applicable wholly to debts incurred for operating expenses, and does not apply where it is a question of original construction, and further, that it only applies where there is a diversion of the income of a going concern from the parties to which that income is equitably and primarily devoted.' It does not appear from the record in this case, nor otherwise, that prior to the receivership there was any diversion of current earnings or funds which should have been applied to the payment of intervener's claim, to the payment of interest on the bonded debt, or any diversion whatever

> of any earnings of the property which should have been applied to the payment of intervener's claim."

Again is this test of *diversion* recognized and applied in the case of *Union Trust Company vs. Illinois Midland Railway Company, 117 U. S., 432*, where, at page 479-80, the court says:

> "The commissioner and the Circuit Court rested the allowance of these certificates on what was said by this court in the case of *Fosdick vs. Schall, 99 U. S., 235, 253, 254*, which views were applied in *Burnham vs. Bowen, 111 U. S., 776*, to the effect that when the current income of a railroad in the hands of a receiver *is diverted to the improvement* of the property by the receiver, and debts for operating expenses are not paid, provision should be made, in foreclosing a mortgage on the road, to pay such debts out of the proceeds of the sale of the property. See also *Union Trust Company vs. Souther, 107 U. S., 591.*"

(c) The only other cases in which a mortgage lien has been postponed are those in which the doctrine of estoppel is applicable.

We do not desire to have the court understand us as contending that diversion is *absolutely the only ground* upon which rests this power of a court of equity to diplace mortgage liens in favor of unsecured creditors in cases of insolvent railroads. Our argument has so far been made solely with reference to the facts in this particular case. We are acquainted with that other class of cases in which priorities are based on the doctrine of estoppel.

We also are aware that some text writers have attempted to add still another ground upon which to rest this power, making in all, three—"Diversion of Income," "Estoppel," and "Necessity." We submit, however, that a close analysis of the decisions will show "Necessity" to be simply one of the elements of "Estoppel," and that the two are really the component parts of one.

Simply for the purpose of distinguishing between the case at bar, and those based on estoppel, we desire to call the Court's attention to a few leading cases illustrative of the latter.

In *Farmers Loan & Trust Co., vs. Green Bay Co., 45 Fed. Rep., 664,* the Court, after stating the doctrine based on the diversion of income, said:

> "The exercise of this equitable power in the Court is not, however, dependent solely upon diversion of current earnings to payment of bonded interest, leaving current expenses unpaid, but is exercised as well in consideration of the fact that, *in case of failure of the trustees to take possession upon default,* it is indispensable to the preservation of the property that it should be operated. It must be kept a going concern. The expense of such operation and maintenance within a limited time prior to the receivership is therefore allowed priority."

In *Union Trust Company vs. Souther, 107 U. S. 591,* this Court said:

> "The right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principle and interest, instead of current expenses. * * * * Many other considerations may make such order reasonable, and this case furnishes a direct

> example. The first default in the payment of interest under the mortgage occurred in October, 1873. The bondholders did not see fit to take possession, which they had the right to do when the default had continued six months. On the contrary, notwithstanding, no payments of interest were made, they allowed the company to operate the road and incur obligations therefor, until December, 1877. This was evidently in the hope that their condition would be improved by the delay. * * * * There cannot be a doubt that it was for the interests of the bondholders that the road should be kept in operation, and as they did not see fit to take possession while it could only be operated at a loss, it was certainly not an abuse of judicial discretion for the Court to order as the condition of granting the application for a receiver, that debts incurred by the company in thus procuring their credit, should be paid from the income of the receivership."

Again in *Burnham vs. Bowen, 111 U. S. 776*, the mortgage bondholders were never paid any interest, but the company was allowed to remain in possession and operate the road for a number of years. By reason of that fact this Court there said:

> "The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similiar expenses to do what the company, with their consent and approbation, was doing for them."

It is to be observed that the cases in which the question of "Necessity" is most discussed and which text writers cite as supporting "Necessity" as a distinct ground upon which to rest this power, are cases in which the trustee had failed to take possession upon default in interest; and that the "Necessity" referred to is that of keeping the railroad a going concern *during the period the trustee failed to act*. This neces-

sity of course is two fold; first, to serve the public and, second, to preserve the mortgage security. But behind both is the fact that during the time at which this necessity existed, the trustee permitted the railway company to do what it would have had to do had it taken possession of the property, viz: to meet these necessities by incurring obligations for the operation of the property during that time. In other words, that the trustee by remaining inactive led the general creditors to believe that the interest was being paid, and thus permitted the company to become its agent for the operation of the road. It is, therefore, that we contend that the whole reasoning is comprehended by the single ground of "Estoppel."

(d) **The doctrine of estoppel can not be applied to the case at bar.**

In this case the trustee procured the Circuit Court to take pessession of the property twenty days after default in the payment of interest, (R. pp. 5 and 22) and we feel justified in asserting that it would be impossible, except upon preconcerted plans adopted by both the trustee and railway company, for a trustee to be more active in seeking remedy than this one was. On this question Judge Jenkins said in *Farmers' Loan and Trust vs. Green Bay, supra:*

> "The bonds of American railways are scattered throughout Europe, and are held in many hands. It requires much time to institute concerted action by the holders after default in the payment of interest."

In *Union Trust Co. vs. Souther, supra*, the bondholders did not see fit to take possession until four years after default, and in *Burnham vs. Bowen, supra*, the trust deed was executed in June, 1871, and "no interest was paid on these bonds, but the company remained in peaceable possession and operated its road until the early part of the year 1875," when suit to foreclose was begun. So in all these "estoppel" cases it will be found that the time during which the trustee failed to act is not measured by days, but by months and years. For this reason we are hardly justified in anticipating that opposing counsel will contend that the doctrine of estoppel can be applied to the case at bar.

(e) If the right of recovery depends on diversion, the same must be alleged and proved.

In *Fosdick vs. Schall, supra*, this Court said:

> "All depends upon a proper application of well settled rules of equity jurisprudence to the facts of the case, as established by the evidence."

If, therefore, the facts which constitute the diversion have not been alleged, how can a Court apply the rules of equity jurisprudence and grant relief?

(f) Where there has been no diversion there can be no restoration.

Did this Court mean absolutely nothing when it said in *Fosdick vs. Schall*, that "it follows that if

there has been in reality no diversion, there can be no restoration;" and when again in *Burnham vs. Bowen* in reaffirming and construing *Fosdick vs. Schall*, it said: "All we then decided, and all we now decide is, that IF the current earnings are used for the benefit of the mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the *restoration* of the fund which has thus been *improperly applied* to their use;" and when in the very late case of *St. Louis Railway Company vs. Cleveland Railway Company, 125 U. S., 658*, after referring to almost every case which it had decided touching this question, it again said:

> "The rule governing in all these cases was stated by Chief Justice Waite in *Burnham vs. Bowen;* as follows: 'That IF the current earnings are used for the benefit of the mortgage creditors, * * * the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' *There has been no departure from this rule in any of the cases cited. It has been adhered to and reaffirmed in them all.*"

Thus always has the diversion been made the condition precedent to the restoration, and it follows unquestionably that unless there has been a diversion there can be no restoration.

(g) **If the amount of restoration depends upon the amount of diversion, how can relief be granted unless the latter is alleged and proved?**

That the *amount of restoration* does depend upon the *amount of diversion* was announced in the earliest

case, when, in *Fosdick vs. Schall*, the Supreme Court said:

> "What is done, therefore, must be with a view to a *restoration* by the mortgage creditors of that which they have inequitably obtained. *It follows that if there has been in reality no diversion there can be no restoration; and that the amount of restoration should be made to depend upon the amount of diversion.*"

In the case of *St. Louis, Alton & Terre Haute Railway vs. C., C., C. & I. Railway, 125 U. S., 658*, this court announces that it is absolutely necessary to prove a diversion before the mortgage lien can be postponed. There the propositions on which counsel for intervening petitioner based its right to the relief prayed for are stated as follows:

> 1. "Because it is an *unpaid operating expense* of the Indianapolis and St. Louis Railroad Company, there having been gross earnings abundant to pay all operating expenses, including the rent of the leased line.
>
> 2. Because it is a debt justly due to the petitioner *as a connecting line.*
>
> 3. Because gross earnings lawfully applicable only to operating expenses, until every operating expense has been fully paid, have been diverted to the benefit of the bondholders of the petitioner in payment of bonded interest, and in adding increased value to the mortgaged property by additions and improvements, to an amount sufficient to have paid the debt, now due to the petitioner, many times."

In that case the petitioner attempted to show a diversion, and, considering the propositions relied upon by it, in connection with the facts established by the evidence, this court said:

"But none of these reasons, standing by themselves, are sufficient. It is undoubtedly true that operating expenses, debts due to connecting lines growing out of an interchange of business, and debts due for the use and occupation of leased lines, are chargeable upon gross income before that net revenue arises which constitutes the fund applicable to the payment of the interest on mortgage bonds. But here there is no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its *corpus;* and it can not be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens."

"There are cases, it is true, where, owing to the special circumstances, an equity arises in favor of certain creditors of an insolvent railroad corporation, otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens. Illustrations and instances of these cases are found in *Fosdick vs. Schall, 99 U. S., 235*; *Miltenberger vs. Logansport, C. & S. W. R. Co., 106 U. S., 286; Union Trust Company vs. Souther, 107 U. S., 591*; *Burnham vs. Bowen, 111 U. S., 776; Union Trust Company vs. Illinois Midland Railway Company, 117 U. S., 434; Dow vs. Memphis & L. R. R. Co., 124 U. S., 652; Sage vs. Memphis & L. R. R. Co. 125 U. S., 361; and Union Trust Company vs. Morrison, 125 U. S., 591.* The rule governing in all these cases was cited by Chief Justice Waite in *Burnham vs. Bowen, 111 U. S., 776, 783*, as follows: 'That if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has thus been improperly applied to their use.' *There has been no departure from this rule in any of the cases cited. It has been adhered to and reaffirmed in them all.*"

"Admitting, therefore, that the reasonable rent of the leased line accruing to the petitioner was a proper charge upon the gross income of the Indianapolis & St. Louis Railroad Company, as a part of its current operating expenses, before any net income could arise applicable to the payment of the interest on the mortgage bonds,

> *it must still be shown to entitle the petitioner to the relief prayed for, that the arrearage due on account thereof has arisen by the diversion and misappropriation of the fund that ought to have been applied to its payment for the use and benefit of the mortgage bondholders.* Counsel for the petitioner undertake to do this, and insist that upon the proofs in this case it satisfactorily appears that such a diversion and misappropriation have taken place to its injury and to the advantage and benefit of the bondholders claiming the fund in Court for distribution."

The Court then examines carefully the alleged diversions and misappropriations, and finding that there has been no diversion proved, decrees that there is nothing to be restored. We submit that even if this case stood by itself it would be absolutely conclusive of the necessity of alleging and proving a diversion.

SIXTH.

Appellee Relies Solely on the Order Appointing the Receivers for Its Right to Priority.

The *only ground* relied on by appellee for its right to the relief sought, is that its claim "may be allowed and ordered to be paid *under the order of the Court heretofore made herein* directing the payment by the receiver of debts incurred by the Chicago, Peoria & St. Louis Railway Company within six months prior to the appointment of the receiver. (R. p. 26.)

The order appointing the receivers authorized them to "collect and receive the tolls, rents, moneys, issues

and profits of said premises and property as covered by this order, and out of the same they shall put, maintain and keep said property in good repair, and shall further pay," among other things, "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past."

(a) That order created no vested right.

Admitting, *arguendo*, that the claim in this case is for "materials and supplies furnished within the six months, and, therefore, comes clearly within the order appointing the receivers and directing them to make certain payments, we submit that that in itself could in no way affect either this particular petitioner's right of recovery, or a valid defense which might exist to the claim. In the very first place, the order appointing the receivers is interlocutory, not final; cannot be appealed from, and therefore, may be modified.

On the other hand, in support of the proposition, that the order of the Court is sufficient to establish and administer principles of equity, it has often been contended, that a court in appointing receivers has a right to impose conditions, and having done so, if the mortgagees take no action to prevent the full operation of the order, they may be considered as having acquiesced therein, and are thereby bound.

Curiously enough also, this contention has its basis in the language used by Chief Justice Waite in the case of ***Fosdick vs Schall, supra,*** which, if it stood by itself, might go far to make the contention plausible. Fortunately, though in this very same case we find the Chancellor limiting and modifying that assertion by language incapable of but one construction. After discussing the ordinary way in which receivers of railroads are usually appointed, and the composition of the order to be entered at that time, he goes further and says that although each case will necessarily have its own peculiarities, yet as the power to make these payments rests upon a diversion, that:

> "Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion there can be no restoration; and that the amount of restoration should be made to depend upon the amount of diversion. If in the exercise of this power, *errors are committed*, they, like others, are open to correction on appeal. *All depends upon the proper application of well settled* rules of equity jurisprudence to the facts of the case, as established by the evidence."

From the above it is plain that the order appointing the receiver is not intended to adjudicate claims upon which no evidence has been introduced. As the court says, if any errors are committed they are open to correction on appeal. Now, inasmuch as an appeal does not lie from an interlocutory order, we can not assume that the Supreme Court intended an appeal from the order appointing the receiver, for such con-

struction of its language would be meaningless. The only appeal which could have been contemplated is an appeal from a final order entered in the prosecution of each specific claim upon which sufficient evidence has been produced to allow the court to act intelligently thereon.

While the courts may have attempted in earlier adjudications to announce as a principle, that a chancellor has the right to make a receivership conditioned on the payment of certain claims; latterly, they have taken great pains to denounce it as utterly unsound. In *Kneeland vs. Trust Company, 136 U. S.*, this court said:

> "When the court appoints a receiver of railroad property *it has no right to make that receivership conditional on the payment of other than those few unsecured claims which by the rulings of this court have been declared to have an equitable priority.*"

This same question was before the Court of Appeals on the same order in the case of *Mather Humane Company vs. Anderson and Bosworth, 76 Fed. Rep., 164.* There, as here, petitioner relied on the order of the court appointing the receivers for its right to payment, and the court, in disposing of that contention, said:

> "Car rentals are not 'materials and supplies,' and besides, *the order being in that respect interlocutory, is not controlling of the subsequent action of the court. It created no vested right, and if wrong, was to be disregarded.*"

(b) Each case depends upon the proper application of well settled rules of equity to the facts as established by the evidence.

That this construction is the only logical one is supported by the last sentence in the above quotation from *Fosdick vs. Schall*, where the court, as though to leave no doubt, says: "All depends upon the proper application of well settled rules of equity jurisprudence *to the facts of the case, as established by the evidence.*" As to this it is sufficient to say, that it is a well settled practice that upon the appointment of a receiver no evidence is introduced as to claims which have accrued in the six months preceding. Of its very nature such a thing is impossible.

The above construction, that each case must depend upon the evidence introduced to support it, and not merely upon the order appointing the receiver, has been announced in *Trust Company vs. St. Louis Railroad, 41 Federal Reporter, at page 552*, where it is said:

> "Circuit Judge Brewer appointed a receiver and directed 'that the said receiver pay, out of any income or revenue which may come into his hands, all just claims and accounts for labor, supplies, professional services * * * that have been earned or matured within six months prior to the date of this order.' *This order was not intended to be final. Its purpose was to confer on the receiver a present authority to pay wages due employes and such like claims, the payment of which ought not to be delayed. The final order to be made on the subject was left for future action.*"

Can it be contended, then, that the order which is usually entered on the appointment of receivers is to be taken as final and conclusive? We say not. On the contrary, we insist that it is simply arming the receiver with the power which would be necessary to preserve the property as a "going concern" while in his custody if the persons to whom that class of debts are due from the railroad company should refuse to continue in the employment of the receiver unless their claims were paid. It simply vests in the receiver the authority to pay those claims, if in his judgment their payment is necessary and indispensable to the maintenance of the property under the receivership.

Again in *Blair vs. St. Louis Railroad, 22 Federal Reporter, at page 474*, the court said:

> "It is true that the court, as a condition of the appointment of a receiver, may, in his discretion, require the payment of certain claims, *but that discretion is not an arbitrary one.* It may not require the payment of any claims that it desires, *but only such claims as it is equitable should be paid*—that in equity are paramount to those of the mortgages, *and if it is equitable that these claims should be paid prior to the mortgage debt, then what difference can there be in the mere making of an order therefor? In all cases the payment of such claims rests on the fact that it is equitable that they should be paid, and ofttimes this equity can only be determined upon a full investigation into their nature—an investigation which cannot be had at the time the receiver is appointed.*"

SEVENTH.

The Facts Established by this Record will not Warrant the Application of any well Settled Rule of Equity for the Displacement of a Vested Lien.

The only evidence introduced was the testimony of Mr. Hinchcliffe, Auditor for the Receiver, to prove that the items enumerated in the exhibit to the intervening petition were correct. (R. pp. 38-39.) There is no controversy about this. We admit that the exhibit is a correct statement of the materials furnished and labor performed within the "six months," and also that the amounts are the reasonable value of the same. True, Mr. Hinchcliffe also said: "It is a correct statement of the account payable within the six months rule." But we hardly think a court would consider such a statement as evidence, for it is simply a conclusion of law, and Mr. Hinchcliffe was not sworn as an "expert on law." The most that can *properly* be deduced from it is that the items accrued within the six months.

(a) On the Theory of Diversion, no evidence was introduced to prove:

Generally.

That the mortgage bondholders had obtained possession of that, "which in equity belonged to the

whole or a part of the general creditors," or to appellee; nor

Specifically.

(1) For Recovery out of the income of the Receivership: That the income arising from the current earnings of the railway company was diverted from the payment of current expenses to the payment of the mortgage debt, principal or interest; nor

(2) For Recovery out of the *corpus* of the Mortgaged Premises: That the net income arising from the operation of the property by the receiver, after paying all necessary operating expenses, was diverted from the payment of the claims of general creditors to the betterment of the mortgaged property.

(b) **On the Theory of Estoppel, no evidence was introduced to prove:**

That the trustee of the mortgage bondholders failed, for an unreasonable time after the default in the payment of interest, to move the court to take possession of the mortgaged premises.

CONCLUSION.

We therefore submit that the questions involved in this record are not only important, but that the Court of Appeals is at variance with other Courts of Appeals in the decision rendered by it herein, and that a Writ of Certiorari should issue to review said decision.

We also submit, that if the Writ of Certiorari is allowed, the decision of the Court of Appeals should be reversed and the intervening petition of the Terminal Railroad Association dismissed at its cost.

Respectfully submitted,

BLUFORD WILSON AND

PHILIP BARTON WARREN,

Solicitors for Petitioner.

Reply Brief of Wilson & Warren

Petitioner.

Supreme Court of the United States

October Term, 1897

Filed Jan. 11, 1898.

NO. 535

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,

Appellant,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,

Appellee.

Reply Brief and Argument of Appellant

IN SUPPORT OF

Petition for Writ of Certiorari.

BLUFORD WILSON AND
PHILIP BARTON WARREN,
Solicitors for Petitioner.

Supreme Court of the United States

October Term, 1897

NO. 535

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,

Appellant,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,

Appellee.

Reply Brief and Argument of Appellant

IN SUPPORT OF

Petition for Writ of Certiorari.

It is unnecessary to follow counsel for the intervener in their not over courteous criticisms of the receiver's action in presuming to resist, to the court of last resort, their unskillful, inapt and totally inadequate petition.

In support of their one proposition that the receiver had no "appealable interest," they dwell upon what they term

> "The failure on the part of the receiver to comprehend the difference between *diminution of the estate* and *distribution of the assets of the estate.*"

The sufficient answer to this is found in the fact that the receiver is the receiver of the entire estate for the benefit of whom it may concern *in the order of equitable priorities.* So far as the bondholders are concerned, to pay an unsecured creditor out of a fund belonging to them, is just as much a diminution of their estate, as it would be to pay any other illegal and unjust claim against the estate.

It is not enough that an unsecured claim should be "just" as against the Company. It is indispensable and of the very essence of equity, in order to entitle it to preference over the mortgage debt, that all the equitable conditions entitling it to such preference, should not only be aptly alleged in the pleadings, but should also be established by competent evidence.

Especially is this true, when, as in the case at bar, it clearly appears upon the face of the record that the defendant railway company is insolvent and unable to pay its floating debt, and when it further affirmatively appears that the mortgaged property is an insufficient and inadequate security for the payment of the mortgage debt.

These facts are specifically averred in the bill of complaint filed by the Mercantile Trust Company, and are nowhere controverted;

> "X. And your orator further shows unto your Honors, that it is informed and believes that the said railway company is insolvent and unable to pay its floating debt and current, and presently accruing indebtedness."
>
> "XI. Your orator further shows, that the said mortgaged property is insufficient and inadequate security for the payment of the outstanding bonds secured by the said mortgage; that there is danger that the said property may be sold under judgments, and that the property and lines of said company may be separated and broken up, and the earning capacity destroyed or impaired by the contests of creditors for conflicting claims, *and the mortgaged premises wasted and depleted.*" (R. p. 6.)

It further appears that the relief prayed by the the trustee was that

> "The deed of trust may be decreed to be a lien upon all property mentioned and described therein, and upon all the property, real, personal or mixed; rights, franchises, lands, titles, railroads, branches, extensions; tolls, incomes, rents and issues of the said railway company, described in the said mortgage or trust deed, within the jurisdiction of this Honorable Court, and that the said railway company may be decreed to pay unto your orator and the other bondholders, under aforesaid mortgage or deed of trust, all arrears of interest now due, or that may hereafter become due and payable upon said bonds, together with all the costs and expenses in this behalf incurred and expended." (R. pp. 6 and 7.)

And the further prayer was that a receiver might be appointed in aid thereof, with directions to take possession of all the said mortgaged property for the benefit of the bondholders.

Thus, as we see, the bondholders claim a prior lien upon the entire estate, which is alleged to be an inadequate security for the payment of the mortgage debt. This being established upon the record, what possible difference can it make to the bondholders, whether an unsecured claim is legal or illegal, just or unjust? Unless facts are alleged and proved that take it out of the unsecured class, and entitle it to preference, the wrong to the bondholders from paying such unsecured claim is precisely the same as that which would result from paying an illegal claim.

In all such cases the distribution of assets and the diminution of the estate, except in strict conformity to priorities, mean to the mortgage creditor the same thing.

It follows, therefore, that the obligation resting, in this case, upon the intervener and pleader to show that his unsecured claim is equitably entitled to preference, is quite as imperative as is the obligation of the holder of any other claim, to establish by competent proof that his claim is legal.

If the receiver had such an interest as entitled him to defend, as to legality, before the master and before the Circuit Court, he had such an interest as entitled him to appeal on the question of priority, especially where the court granted him the right to so appeal. Any other conclusion would seem to be absurd, and amounts to a denial of justice to the mortgage creditors,

whose rights the receiver was appointed to conserve, and who had been lulled into quietude and inaction by the course of the intervener in litigating his claim against the receiver, as sole respondent, in all preliminary stages.

Up to the point of a favorable decree from the Circuit Court, the intervener was silent as to the right of the receiver to appear as sole respondent and defend. The intervener made no objection to the receiver as a competent defender of the estate as long as he was having things his own way. If the receiver had no appealable interest, the intervener was presumed to have known that before the appeal was taken, and it would have been more consistent with fair fighting if he had made the objection at the start. Somebody certainly had the right to resist the claim and to appeal from an adverse decision. It is conceded that the trustee for the bondholders or the company, up to the date of foreclosure and sale, and the purchasers after sale, had such right.

Can it be said that the receiver did not represent them?

In point of fact the record shows that the Mercantile Trust Company of New York, trustee and complainant in the cause, and C. H. Bosworth, the receiver therein, was represented by the same counsel. The intervener recognized this fact in the very decree drawn

by his counsel and entered by the Circuit Court allowing the claim. (R. p. 31)

It also appears that the Mercantile Trust Company, as trustee, from the very first, objected to the allowance of "six month's claims," including traffic balances. (R. p. 25) The inference is, therefore, conclusive that the mortgage creditors were not indifferent parties in the litigation as between the receiver and the intervener, but, through the receiver, were strenuously resisting the allowance of this claim from start to finish.

It also fully appears upon our original brief that all of the litigation affecting the rights of the mortgage creditors and in opposition to the allowance of the so-called preferential or "six month's claims" was made in behalf of the mortgage creditors, in the name of the receiver, and by the same counsel, and that prior to this case, no question about the receiver's right to appeal in all such cases had ever been raised either in the Circuit Court or in the United States Circuit Court of Appeals for the Seventh Circuit.

Only four federal decisions, on the question, are reported. The Fourth and Sixth Appellate Circuits and the Supreme Court, as we have seen, sustain the right of appeal. The Seventh Circuit alone denies it.

The petition of the intervener sets up an unsecured debt of the company, and prays that it may be allowed and paid by the receiver under the terms of the

merely interlocutory order appointing him. Upon its face the petition made no such case as entitled the intervener to priority over the mortgaged estate, to conserve which the receiver had been appointed. Both in practice and upon precedent, as shown in our original brief, the order appointing the receiver invested the holders of "six month's claims" with no conclusive right to payment.

As to matters of practice it would seem to be enough in all the more important steps, and especially in matters of appeal, that the receiver should have the approval and be backed by the authority of the court which appointed him.

All such acts are necessarily performed under the immediate supervision of the appointing power.

In all his acts, the receiver is continually confronted with the danger of removal for misconduct or breach of duty. This is a sufficient restraint upon excess of zeal and the litigious spirit. It should also be, and doubtless is a sufficient assurance to parties litigant against "vexatious litigation at the expense of the estate," or improper interference in litigation.

As the custodian of the estate and its income, the receiver is necessarily brought into the closest contact with all litigation looking to the application of the income and the distribution of assets. He is nearly always a party and often the sole respondent. Even

after sale both estate and income remain in the custody of the receiver frequently for weeks and months. For the payment of claims and debts, purchasing bondholders often reinforce the income by cash advances. The right to sue and be sued is one of the ordinary powers of the receiver. The right of appeal is a necessary incident and corollary, and the only limitation upon the exercise of the right should be that imposed by the good sense of the receiver and the sound discretion of the chancellor charged with the general administration of the trust.

Respectfully submitted,

BLUFORD WILSON,

PHILIP BARTON WARREN,

Solicitors for Petitioner.

Supreme Court of the United States

October Term, 1898.

NO. 211.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,
Appellant.

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,
Appellee.

Brief for Appellant.

STATEMENT.

On the 21st day of September, 1893, the Mercantile Trust Company of New York filed its Bill of Complaint in the United States Circuit Court for the Southern District of Illinois against the Chicago, Peoria and St. Louis Railway Company, praying a foreclosure of its mortgage, and the appointment of a receiver *pendente lite*. Thereafter, on the same day,

an order was entered in the cause appointing C. H. Bosworth and E. Ellery Anderson receivers of the railroad and property of the said Chicago, Peoria and St. Louis Railway Company, clothing them with all the authority and rights usually given to receivers by courts of equity to take charge of and operate railroads at the instance, and for the benefit of mortgage creditors.

Among other things this order contained a direction to the receivers to collect and receive the tolls, rents, moneys, issues and profits of said premises and property, and out of the same equip, maintain and keep the property in good repair, and pay, among other things, "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last passed, and all tickets, trackage and traffic balances due from connecting railroads" To this, counsel for the Mercantile Trust Company objected, and upon argument the court overruled the objection. (R. p. 20.)

On the 27th day of May, 1895, the Terminal Railroad Association of St. Louis filed its intervening petition in this foreclosure cause, and alleged that within the six months prior to the appointment of the receivers it performed certain labor and furnished certain materials for and to the defendant railway company, amounting in value to the sum of $8,162.11.

and prayed that the same be allowed and ordered to be paid under the order of the court appointing the receivers. (R. p. 21.)

To this intervening petition the receivers, on June 8, 1895, filed their answer, first saving all benefit and advantage of exception to the errors, uncertainties and imperfections in the petition, and then averring that the facts set forth in the petition might be true, but that they were utter strangers to the same, and could not form any belief thereon, and prayed strict proof thereof; and further answering, denied that the petitioner was entitled to the relief, or any part thereof, demanded, and prayed the same advantage of their answer as if they had pleaded and demurred to the petition. (R. p. 23.)

This intervening petition, under a general order of reference, went to Stuart Brown as master in chancery, and he, after hearing certain evidence, made and filed his report on January 6, 1896, wherein and whereby he reported that he had examined the petttion and answer and taken evidence, and found that there was due the petitioner, for labor and materials furnished, the sum of $8,162.11, and that such amount was a lien on the property of the defendant company, prior and superior to the claims of the mortgage bondholders, and that it should be paid out of the surplus income, or from a sale of the property. (R. p. 24.)

To this report, the receiver, on the 29th day of January, 1896, filed his exceptions, and these exceptions were thereafter, on the 30th day of July, 1896, overruled by the Circuit Court; and a decree entered on the petition in conformity with the report of the master. (R. p. 26) From this decree the receiver prayed and obtained an appeal to the United States Circuit Court of Appeals for the Seventh Circuit.

It is to be particularly noted that the trustee under the mortgage sought to be forclosed by the proceeding in which the receivers were appointed, lost no time in taking active steps to pursue the remedy provided in default of the covenants of the mortgage, to be performed by the mortgagor. The bill to foreclose was filed just twenty days after default in the payment of the interest coupons attached to the bonds, (R. p. 5) and the court took immediate possession of the property through it receivers. (R. p. 18.) It is also to be noted that the intervening petitioner neither averred in its petition nor proved that there had been a diversion of the income of the railway company from the payment of operating expenses to the payment of interest due on the mortgage bonds; nor in any way that the mortgage creditors, whose vested contract lien it sought to displace, had received possession of that which in equity belonged to the whole or a part of the general creditors. On the contrary, the petitioner relied entirely, for its right to priority, on the order

of the Circuit Court, appointing the receivers for this property, directing them to pay all claims for materials and supplies incurred within the six months next preceding (R. p 21).

The said appeal came on for hearing, was fully argued in the said Court of Appeals, and subsequently, on the 7th day of June, 1897, the said court handed down its decision dismissing the said appeal, on the principal ground that the receiver had no interest in the controversy and had no right to appeal from the decree of the Circuit Court which appointed him (R. p. 35).

Thereafter, on the 25th day of June, 1897, the receiver filed his petition in said Court of Appeals for a re-hearing, but said petition was also denied. (R p. 58-62).

Because of the importance of the question of practice as to a receiver's right to appeal, and the conflict between the decisions of the several Courts of Appeals on that question; and also because of the importance of the question of law raised on the merits of the controversy, and of the conflict in the decisions of the several Courts of Appeals with this Honorable Court on that question, the receiver felt justified in presenting to this court a petition for a Writ of Certiorari to the said Circuit Court of Appeals for the

Seventh Circuit. The writ being granted, the certiorari and return were filed in this court on the 19th day of August, 1898.

The issue raised by the intervening petition of the Terminal Railroad Association, filed in the original foreclosure cause, and the answer of the receiver thereto is, solely the right of the intervener to have its claim paid out of the income in the hands of the receiver arising from the operation of the railway property. (R. p. 26, 27.) And although the only party made defendant to said intervening petition was the receiver, *and the only relief prayed was against the income*, nevertheless the said Circuit Court entered a decree not only directing the receiver to pay the demand out of the income, *but also directed that in default thereof, said demand should be paid out of the proceeds of the sale of the mortgaged premises ahead of the mortgage debt.* (R. p. 26).

Ever since the institution of this receivership the burden of defending these assaults on the receiver's possession, both of the property and income, has fallen entirely on the receiver, who has conducted the same solely in his own name; and in every case which has been appealed the said Court of Appeals entertained the appeal, and disposed of the case on its merits.

See *Mather Humane Transportation Company vs. Bosworth, 76 Fed. Rep., 164.*

Hook vs. Bosworth, 64 Fed. Rep., 443.

Bosworth vs. National Bank, 64 Fed. Rep., 615; and Bosworth vs. Francis Hook, 77 Fed. Rep., 686.

It was not until the present case that the Court of Appeals decided the receiver had no interest in such controversies and no right to appeal; and in this case it dismissed the appeal *sui sponte* and characterized the issues raised by the pleadings and the errors assigned on the record as presenting merely moot questions.

The denial of this right to appeal involves an important question of practice and is directly in conflict with the decisions of the Courts of Appeals for the Fourth and Sixth Circuits, and we submit is manifest error.

The refusal of the Court of Appeals to dispose of this case on its merits and to reverse the decree of the Circuit Court for the Southern District of Illinois, leaves the receiver no recourse save this application to this Honorable Court.

Assignment of Error.

First.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth, receiver, on the ground that he had no interest in the con-

troversy, for the reason that the intervening petition prayed relief against the said Bosworth, and the issue raised by the answer thereto made the proceeding an adversary one, in which the said Bosworth represented the interests of whomsoever might be ultimately adjudged to be entitled to the estate of which he was temporarily in charge as such receiver.

Second.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he had no right to appeal from the decree of the Circuit Court for the Southern District of Illinois, for the reason that the said Circuit Court expressly authorized and directed the said Bosworth to prosecute said appeal.

Third.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H Bosworth on the ground that he had no right to appeal, for the reason that it is incumbent upon him to carefully protect the property confided to his keeping as receiver, and the right to sue or defend carries with it the right to follow the suit to the court of last resort.

Fourth.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H Bosworth on the ground that he had no interest in the controversy,

for the reason that the said C. H. Bosworth, as receiver, represents all the parties to the original foreclosure cause, as against the parties who may attempt, by a separate and distinct action, to diminish and segregate the estate which he was appointed to conserve.

Fifth.

The Court of Appeals for the Seventh Circuit erred in dismissing the appeal of C. H. Bosworth on the ground that he did not represent the parties to the original foreclosure cause as against the Terminal Railroad Association, a stranger thereto, attempting to diminish and segregate the estate in controversy between the parties to the original cause.

Sixth.

The Court of Appeals for the Seventh Circuit erred in deciding that the receiver represented the Terminal Railroad Association as well as the mortgagee in the protection and safe keeping of the income of the receivership and the property in controversy between the parties to the original foreclosure cause.

Seventh.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that *prima facie* the mortgagee was entitled to the property in litigation and to the income of the receivership, and

that, as to the protection and safe keeping of the same, the receiver represented the mortgagee as against the Terminal Railroad Association.

Eighth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the receiver, in the care and custody of the property, represented solely the parties to the original foreclosure cause, until some other party by intervention acquired a substantial, prior or equal right therein by a final adjudication in a court of last resort.

Ninth.

The Court of Appeals for the Seventh Circuit erred in concluding it to be conceded that the debt in controversy was a just claim against the *estate* from the statement in appellant's brief that there was "no controversy as to the labor having been performed or the material furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same," for the reason that such language can only be construed to concede the claim to be just as against the defendant railway company.

Tenth.

The Court of Appeals for the Seventh Circuit erred in assuming as the basis for its judgment "that prior to the decree appealed from, the railway had

been sold under decree of sale and has passed out of the possession of the receiver and into the possession of the purchaser, and also that the receiver had not in hand moneys with which to pay the debts adjudged;" for the reason that the record in the cause is wholly silent as to such facts.

Eleventh.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to reverse and annul the decree of the Circuit Court for the Southern District of Illinois.

Twelfth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that, before the Terminal Railroad Association was entitled to have its claim paid out of the income of the receivership, it should allege and prove that the income arising from the current earnings of the railway company was diverted from the payment of current expenses to the payment of the mortgage debt.

Thirteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that, before the Terminal Railroad Association was entitled to have its claim paid out of the proceeds of the sale of the mortgaged premises, ahead of the mortgage indebtedness, it should allege and prove that the net income arising from the operation of the property by the re-

ceiver, after paying all necessary operating expenses, was applied to the betterment of the mortgaged property.

Fourteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that, even if there had been such a diversion of the income arising from the current earnings of the railway company, or from the current earnings of the receiver, the amount of restoration depends upon the amount of diversion, and before the Terminal Railway Association was entitled to have its claim paid out of either the income of the receivership or the proceeds of the sale of the mortgaged premises, it should have alleged and proved that the amount so diverted aggregated at least the amount of its claim.

Fifteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the income arising from the current earnings of the railway company was diverted from the payment of current expenses to the payment of the mortgage debt, principal or interest.

Sixteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor

proved that the net income arising from the operation of the property by the receiver was diverted to the betterment of the mortgaged property.

Seventeenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railroad Association had neither alleged nor proved that the mortgage bondholders had received that which in equity belonged to the general creditors of the railway company.

Eighteenth.

The Court of Appeals for the Seventh Circuit erred in failing and refusing to decide that the Terminal Railway Association relied wholly, for its right of recovery, on the order appointing the receiver, directing him to pay certain claims, and in failing and refusing to decide that such order alone was not a sufficient ground of recovery.

Argument.

The questions presented by this application are: *First*, did the Court of Appeals for the Seventh Circuit err in denying to the petitioner a right of appeal? *Second*, is an unsecured creditor of an insolvent railway company entitled to priority over the mortgage bondholders, either in the income of the receivership, or the proceeds of the sale of the mortgaged premises, without alleging and proving a diversion of income?

FIRST.

A receiver's right to appeal is sustained by principle.

Did the Court of Appeals err in dismissing the appeal? We submit that not only the weight of authority is against the conclusion reached by it, but also that such authority has for its foundation sound reasoning.

(a) A receiver is appointed to protect the estate for whomsoever may be ultimately entitled thereto.

Inasmuch as one of the grounds assigned by the Court of Appeals for dismissing the appeal was that the receiver had no interest in the controversy, it becomes important to ascertain what interest a receiver has in the estate he is temporarily in charge of, since the controversy in question grew out of an attempt to diminish and segregate that estate.

In the early case of *Fosdick vs. Schall, 99 U. S.*, 235, this court announced:

> "He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court *proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place.*"

Primarily, and of necessity, until the end of the original litigation, when it may be definitely ascertained which of the parties is entitled to the property, he is the representative of the estate. As between the parties to the *original controversy, i. e.*, the foreclosure of the mortgaged estate, he cannot be said to represent one as against the other, but he represents both.

This representative character is well expressed in *Booth vs. Clark, 17 Howard, 322,* where it is said:

> "The receiver is an indifferent person between parties, appointed by the court to receive the rents, issues or profits of land or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. *Wyatt's Practice Reg., 355.* He is an officer of the court, his appointment is provisional. He is appointed in behalf of all parties, and not of the complainants or defendants only. He is appointed for the benefit of all parties who may *establish* rights in the cause."

As between the two original parties, mortgagor and mortgagee, he stands indifferent; but not so as to the two original parties on one side and a stranger (to the original action) on the other side, attempting to wrest a portion of the subject of the original controversy away from *both the original parties.* In such a conflict he represents the one of those original parties who may be ultimately entitled to a prior right in the subject matter in controversy. *When this conflict is ended and the stranger is finally* adjudged to have a right prior to either of the original parties,

then it may be said that another party *has established* a right in the controversy, and the receiver then represents also that party in any subsequent conflict with another stranger. And thus on, as strangers *establish* rights in the cause, the receiver becomes their representative. But we insist that, *by the mere intervention in the original cause, no right is established*, and that it is the duty of the receiver, as the custodian of the property, to defend against such assaults, if necessary, to the court of last resort, and that no right is established until the demand is either admitted or finally adjudicated in a court of last resort.

This distinction has been clearly recognized in the case of *McLeod vs. The City of New Albany, 66 Fed. Rep., 378*, where, in determining the matter presented on appeal, it was necessary for the court to define who a receiver represented in respect to the conservation of the property for which he was appointed. There the court held, at page 381, not that he represented *every* party who might come into the original cause *by intervention*, but that he represented the parties to the *original bill*.

Then, as late as *157 U. S.*, at page 169, we find the Supreme Court in the case of *Shields, receiver, vs. Coleman*, affirming this representative character in announcing the interest which a receiver has in the property in his possession, in the following language:

"But it is said that the receiver had no such interest in the property as will give him a standing in the Circuit Court to petition for the restoration of the property to his possession, or to maintain an appeal to this court from an order refusing to restore such possession. *This is a mistake.* He was the officer in possession by appointment of the State Court, the proper one to maintain possession and to take all proper steps under the direction of the court to obtain restoration of the possession wrongfully taken from him. *It is a matter of every day occurrence* for a receiver to take legal proceedings under the direction of the court appointing him to acquire possession of property or for the collection of debts due to the estate of which he is receiver."

In the very case at bar appellee, in drafting its intervening petition, recognized this representative character by making only the receiver a party, and by praying relief against him alone. It is clearly to be seen that this controversy is one between the appellee on the one side, and every other claimant to the property in the hands of the receiver on the other side. If appellee obtained a decree against the receiver, it well knew that such a decree would bind all the parties to the cause in which such receiver was appointed. This is so, however, for the significant reason that *the receiver represents* all the parties to the *original* cause. If, therefore, a decree against him binds the complainants and defendants, is it logic or equity to say that those complainants and defendants are to be deprived of their right to have the receiver interpose for them their defenses to the relief sought against them?

Neither the complainants, nor defendants, nor all other parties claiming any interest in this property, who were in court at the time appellee filed its intervention, could complain that they had not been made parties to this particular intervention, and although they could have insisted on being heard in opposition to the relief sought by it, still, if in their judgment they were satisfied to leave their interests to the protection of the receiver, they could undoubtedly do so.

(b) If any presumption is to be indulged as to which of the original parties the receiver represents, it is in favor of the mortgagee.

It is not to be overlooked that this receiver was appointed on a bill filed by the mortgagee to foreclose this estate, and therefore there is a great distinction between cases of this kind and cases where a receiver is appointed at the instance of the insolvent corporation itself, or to wind up the affairs of a corporation, or to dissolve a partnership. In the one case the court takes possession of the property through its receiver for the purpose of subjecting it to a decree of foreclosure and sale; in another case the court takes possession of the property for the purpose of keeping it intact so that it may the better discharge its public duties; in another case, the court takes possession of the property for the *very purpose* of dividing it between *all classes of creditors.*

Therefore, with this distinction in view, we submit that in a case of this kind where a stranger has intervened, if any presumption is to be indulged as to which of the original parties the receiver represents in a conflict with a stranger, the presumption is that he represents the mortgage bondholders. The very fact that a court will take possession of the estate is conclusive of the *prima facie* case thus made by the complainant in an action to foreclose its mortgage; so that, primarily, the court holds the property through its receiver to satisfy the debt of the mortgagee, and as between the mortgagee and an unsecured creditor, it is certainly a mild presumption that the former is entitled to the estate which the receiver is conserving.

As between the mortgagor and mortgagee, this presumption is recognized in that class of cases in which it is held that until default or the actual possession of the estate by the mortgagee, through a receiver, the income of the property belongs to the mortgagor, to do with it as he sees fit. This warrants the strong presumption, after the mortgagee has moved and has, by the appointment of a receiver, subjected the estate to the forfeiture provided for in the mortgage, that *prima facie* at least, the income derived from the property by the receiver belongs to the mortgagee, and that the acts of the receiver in defending an assault upon such income are *prima facie* in the interest and for the benefit of the mortgagee.

(c) **By intervention the appellee attempted to diminish the estate which the receiver was appointed to conserve.**

By reference to the intervening petition (R. p. 21) it will be seen that the only prayer is that the receiver pay to the intervener a certain sum out of the income of the receivership. No one can question but that the receiver was appointed just as much for the purpose of conserving the income as the *corpus* itself; the mortgagee claimed, under its bill of complaint, the income just as much as it claimed the *corpus*.

Then is not a proceeding, the only object of which is to obtain a portion of the income, an attempt on the part of the intervener to diminish the estate which the receiver is appointed to conserve? Is not this attempt to acquire a portion of the income just as much an attempt on the part of the stranger to divest the receiver of his possession of the estate as though the intervener had claimed a portion of the right of way upon which the railroad track was built? We submit that it is.

If it is the duty of a receiver to resist an attempt to divest him of certain portions of right of way, then, surely, it is as much the receiver's duty to resist this attempt to acquire a portion of this income. And we respectfully submit that in carrying such resistance to the court of last resort the receiver does not make himself a partisan as between the real parties

to the issue before the court in the cause in which he is appointed, viz., the foreclosure of the mortgage; but that he is doing all in his power to conserve the whole estate for whomsoever shall be ultimately entitled to it, and that thereby he is doing what was expressly approved in *McLeod vs. City of New Albany, 66 Fed. Rep., 378*, viz., to contest the right of a stranger to participate in this estate, and thus diminish it.

(d) His duty is to defend the estate against all claims which he deems to be unjust.

In the opinion rendered by the Court of Appeals in the case at bar, it is said of the receiver that "*his duty is to defend the estate against all claims which he deems to be unjust.*" But in applying that principle to the case at bar the court seems to have misapprehended a most material fact, since it concluded, we think erroneously (R. p. 35):

> "That this debt was a just claim against the estate is not doubted *and is conceded.*"

The receiver admitted the claim to be just as against the *railway company*, but *expressly* denied it to be just as against the *estate*. This distinction is vital. To be just against the railway company it need only appear that the services were performed, the material furnished, and that the value was reasonable; but to be just against the estate *it must also appear*

that for the payment of this demand out of the estate the intervener must bring himself within the well defined limits prescribed by the Supreme Court. The right of participation is the very right which the receiver has always denied, and his attitude in this respect throughout the whole litigation has been consistent.

When the intervention was first filed the receiver did not deny the claim as against the railway company, but asserted that even admitting all the facts alleged by the intervener, still it was not entitled to have its demand paid *out of the estate.* This was the substance of the receiver's answer. It was on the issue thus raised that the matter was submitted, first to the master and then to the Circuit Court. *No one then denied the receiver's right to resist this claim.* If he could resist it before the master and in the Circuit Court, *why can he not resist it in a Court of Review?*

This resistance is in the performance of his duty to defend the estate against all claims, and is in accord with one of the late decisions of the same Court of Appeals.

In *McLeod vs. The City of New Albany, 66 Fed. Rep., supra,* a case absolutely on all fours with this case, the Court of Appeals announced most emphatically not only that it was the duty of the receiver to preserve the estate, but that on an appeal from a decree of the lower court adjudging the claim of an

unsecured creditor to be prior to that of the vested contract lien, *the receiver could not object that the original parties to the foreclosure cause were not parties to the appellate proceedings, because he, the receiver, represented them in the Appellate Court*, for the purpose of contesting the claim, and further, because the original parties were not in that Appellate Court objecting that they were not *well* represented.

The facts in the *McLeod case* are so nearly identical with the facts in the case at bar, that we feel justified in here presenting an abstract.

McLeod was appointed receiver of the property of the Kentucky and Indiana Bridge Company in a suit brought against it and the trustees of its mortgage by the Youngstown Bridge Company. In this suit *an unsecured creditor*, the City of New Albany, filed its intervention for the payment of taxes accrued *prior to the receivership*, and prayed that the same be paid out of the funds in the hands of the receiver prior to the claim of any other creditor.

This intervention was referred to a master in chancery, who reported in favor of the unsecured creditor. The receiver excepted to this report, but his exceptions were overruled, the master's report confirmed, and the lower court entered a decree directing the receiver to pay the amount found due. From this decree the receiver appealed to the Seventh Circuit Court of Appeals

Among other errors assigned was a defect of proper parties. The receiver urged not only that the mortgagee should have been made a party, but also all of the parties to the *original* suit. This contention presented fairly and squarely the question as to whether or not the receiver had sufficient interest, in a controversy between various creditors, claiming priority over each other, out of the estate for which he was appointed to conserve, to present the matter for final determination to the court of last resort; or whether or not it was necessary that the particular party whose lien was sought to be displaced should have been made a formal party to the intervening petition in the lower court, and have appealed from its decision, if the same displaced its lien. And in that case the court *decided that very question*, and not only held that it was the duty of the receiver to resist the payment of the taxes out of the estate which he was appointed to conserve, but went further and held that the receiver had sufficient interest in the matter *to fully represent on appeal the parties to the original cause*, whose vested lien the intervener was attempting to displace.

The language used by the court in arriving at the above conclusions (page 381) is:

> "The other parties whose presence is suggested as essential *are parties to the original bill* as holding incumbrances upon the property subordinate to the lien of the complainant. They were in court in the suit in which

the receivers were appointed, and were bound to take notice of the intervening petition of the city filed in that suit, and of the proceedings thereunder. It was not necessary that they should be made formal parties to the petition. Being parties to the suit, they were in fact parties to the intervening petition. The receivers in respect to the conservation of this property *represent all parties to the original bill.* It was their duty to preserve the estate and thereto to pay the taxes thereon. If the taxes were illegally paid, it was their duty, representing all in interest, to contest payment. If parties to the original bill desired to take active part in such contest they had a right to be heard, and such right, if demanded, would doubtless have been accorded to them. They did not so ask, although being parties to the suit they were obligated to take notice of the proceedings. *They are not here objecting that they were not well represented by the receivers.* The latter cannot for the first time, after full hearing upon the merits before the master, object *that those they represented* should be formally notified of the petition."

If, therefore, as that court above holds, *that a receiver cannot object* that the parties whose lien the intervener seeks to postpone is not a *formal* party, upon what principle of justice *can the intervener* set up such a purely technical defense; if that court will not sustain the contention that the receiver does not represent all the parties to the original bill, *when made by the receiver,* why will it sustain the same contention *when made by an unsecured creditor?*

Can it be said that the claim of the City of New Albany for taxes in the *McLeod case* differs in character from the claim of the Terminal Railroad Association in the case at bar? Both are unsecured creditors whose demands accrued prior to the receivership, and the intervening petitions of both

seek a priority over the vested contract lien of the mortgagee, and seek payment of the same out of the estate in the hands of the receivers. Or is there such a difference even in degree, which would sustain the vital distinction that in the first case the receiver has sufficient interest in the estate to warrant his appealing from a decree which would diminish that estate, *and in so appealing he represents all of the parties to the original bill,* while in the latter case he has neither the interest nor represents the parties to the original bill, who claim to be ultimately entitled to the estate he was appointed to protect?

We now beg respectfully to direct the court's attention to a number of cases in which the Court of Appeals has clearly recognized and sanctioned this very receiver's right to appeal from an order of the lower court, which diminished the estate he was appointed to protect, *and which declared "the respective equities of the parties to the suit," as that term is applied in the opinion in this case.*

Mather Humane Transportation Co. vs. Anderson, 76 Fed. Rep., 164, arose in this very foreclosure suit; the lower court entered a decree disallowing intervener a priority over the mortgage lien for car rentals; from this decree intervener appealed to that Court of Appeals, *making only the receiver appellee.* In disposing of the case this court permitted the receivers to resist

intervener's right to priority and sustained their contention in that regard. *No other parties were before the court.*

Hook vs. Bosworth, 64 Fed. Rep., 443, was also a controversy which grew out of this same foreclosure proceeding. In that case Mr. Justice Jenkins, speaking for the Court of Appeals, even went so far as to hold that Bosworth, receiver, represented *solely* the trustee of the bondholders in a litigation which sought to subject certain earnings of the defendant railway company, which accrued prior to the appointment of the receiver, to the lien of the mortgagee. In view of the fact that the receiver there contended that he not only represented the bondholders, but also the general creditors of the company, this holding becomes more significant, inasmuch as the court, to prevent the recovery of those prior earnings by the receiver, based its conclusion that the receiver represented *only the trustee*, on the fact that he did not represent the general or unsecured creditors; and so in the very beginning of the litigation arising out of this forclosure, the Court of Appeals emphatically and unqualifiedly indicated to this receiver that he represented the trustee of the bondholders, and no one else.

There, William S. Hook and Marcus Hook, as officers of the railway company, after the receiver had been appointed, collected moneys from the Federal Government for the transportation of mails by the

railway company. The receiver, conceiving himself to represent both the secured and unsecured creditors, and the money to be a part of the estate which he was appointed to conserve, filed a petition against the Hooks to recover the same. The lower court sustained the receiver's position, but was reversed by the Court of Appeals on the theory that the receiver *represented solely the trustee*, as is shown by the following language from the opinion at page 449:

> "So that the complainant trustee, *or the receivers as its representatives*, have no right to the earnings prior to the filing of this bill. * * * * What right the receivers would have to the fund earned prior to the filing of the bill, *if they represented judgment creditors*, we do not find it necessary to determine. As we have before observed, the record discloses that certain intervening petitions, cross-petitions and bills (some of them filed in the cause of the Mercantile Trust Company against the St. Louis & Chicago Railway Company, of the nature of which suit we are not informed) were ordered to be consolidated with the principal cause for the foreclosure of the trust deed or mortgage. The record is wholly silent with respect to the nature of those petitions, cross-petitions and bills, and to the character which the petitioners, cross-petitioners and complainants therein assumed. We are only told that those proceedings, whatever they were, were consolidated with the principal suit. * * * * *We are, therefore, unable to say that the appellees (receivers) represent creditors as well as the trustees.* We can not, therefore, adopt the suggestion of counsel that these intervening petitions, etc., represent 'labor, supply and traffic balance creditors.' The fact does not appear from the record. We cannot assume it.
> * * * * * * * * *
>
> "It would seem inequitable, under such circumstances, that they should be called upon to respond to the receivers for the amount so paid, *unless possibly* it might be claimed that *they had no right*, after the appointment of receivers, to receive or to so disburse the monies *as against*

representatives of creditors, appropriating it wholly to the payments of debts of their selection, when the debts discharged had only right to share ratably with other indebtedness of the corporation. *We are*, however, from this record, *unable to regard these receivers as representatives of others than the trustees of the mortgage*, who is not entitled to the earnings prior to the receivership."

Can it be said that the position in which the Court of Appeals thus placed the receiver at the beginning of the litigation which arose out of this foreclosure, is in harmony with the position it assigns to him in the case at bar? If not, can it be said that circumstances have arisen which warrant such a radical change? We respectfully submit that as far as the conditions appear from this record they are identical in every detail with those which were disclosed by the record in *Hook vs. Bosworth, supra*, and although that court may personally have known that a sale and transfer of the property had taken place, we submit that this case should be decided on the record just as *Hook vs. Bosworth* was. *There the court said it would not take the suggestion of counsel as to any fact which did not appear in the record*—that it could not "assume it." *And for the reason that certain facts did not appear in the record, it there held the receiver to represent solely the mortgagee.*

If the right of the intervener has been fortified by proceedings subsequent to the filing of its petition, and the record does not contain the same, it is the duty of the intervener to suggest a diminution of the record. The Court cannot assume it.

(*Distilling Co. vs. McNulta, 77 Fed. Rep., 415.*)

Another case in which that Court recognized and sanctioned the receiver's right to resist to the court of last resort, the effort of an unsecured creditor to displace the vested lien of the mortgagee, is *Bosworth vs. National Bank, 64 Fed. Rep., 615.* In that case the bank filed its intervening petition in the foreclosure cause, alleging an indebtedness to it by the railway company of $10,000, upon which $2,500 had been paid in cash, and the balance by two drafts drawn on a traffic balance due from another railroad; that the payment of these drafts had been stopped by the receiver, and thereupon prayed an order directing the receiver to pay the same. The Court of Appeals says:

> "The claim on the part of the bank is that the drawing of the drafts constituted an appropriation in equity to that extent of the said funds in the hands of the drawee, which gave the bank a lien thereon *pro tanto* in *preference to other creditors*, although said drafts were never accepted or paid by the drawee."

So it is, therefore, to be seen that in that case, also, we have a stranger to the original bill intervening in the cause, and claiming the right to have his debts paid out of the estate in the hands of the receiver, ahead of all other creditors. The receiver, while not questioning the validity of the debt as against the railway company, considered it his duty to resist the payment out of the estate in his hands. His position is thus stated by the Court of Appeals:

> "The contention on the part of the receivers is that, inasmuch as the drafts were not presented or accepted, or the money paid before the railway went into the hands of receivers, and the money was then paid over to the receivers on demand, no lien attached to the money in the hands of the drawee, and that the receivers hold it as trustees for the benefit of the railway company and its general creditors."

The Circuit Court sustained the contention of the bank, vis., that it had a lien prior to all other creditors, and directed the receivers to pay it $7,500 out of the estate in their hands. Was not this a decree distributing the assets of the insolvent corporation between conflicting creditors and giving one a right prior to all others? Yet from this decree the receivers appealed, and the Court of Appeals not only sustained the appeal, but went further and maintained the position that the receivers represented the bondholders, the railway company and all other creditors *as against this particular creditor*, and reversed the decree of the lower court, directing it to enter one in favor of the receivers. The Court says (page 618):

> "The receivers stand in the place of the administrator in the Massachusetts case, *and represented not only* an insolvent debtor, but *all* of its creditors as well, whose rights attached to the fund upon their appointment, and before any appropriation of the portion thereof represented by the drafts had been effected by presentation or acceptance, and even before the fund became due and payable by agreement of the railway companies."

So it appears from these two decisions of this Court of Appeals (*Hook vs. Bosworth* and *Bosworth vs. Bank*) that ***it is immaterial whether a receiver represents only***

the mortgage trustee, or all creditors, secured or unsecured, and that in either event it is his right and duty for the preservation of the estate in his hands, for whomsoever may be ultimately entitled thereto, *to resist the diminishing of that estate* by the payment to a general creditor in priority over all other creditors.

Passing now to the next case in which this Court of Appeals has recognized and sanctioned this receiver's right to appeal from an order of the court appointing him, and which directs the distribution of the assets of the insolvent corporation, we come to *Bosworth vs. Francis Hook.* The opinion in the case was handed down in January, 1897, and reported in 77 *Fed. Rep., 686.* In that case Francis Hook filed her intervening petition in the original foreclosure cause, alleging that the receivers had taken possession of one hundred gondola cars, upon which she had a lien prior to all other creditors, securing the payment of a promissory note of the railway company for $11,070 held by her. The petitioner prayed the payment of this amount out of the estate in the hands of the receiver, or in default the surrender of these particular cars, which were also in the hands of the receiver.

On these facts, we again submit that case also was an attempt on the part of one creditor to obtain a priority over other creditors of the estate, and when the Circuit Court entered its decree directing the receiver to pay the intervener the amount in question,

out of the funds in his hands, within a specified time, that such was a "decree declaring the respective equities of the parties to the suit," *not the parties to the original suit*, but parties to the suit *as that term is used and applied in the opinion (R. p. 35.) of the Court of Appeals in the present case.* Again, in that case, the receiver felt it was his duty to take the judgment of the Court of last resort, and so he prayed and perfected an appeal from the order which thus diminished the estate and directed him to part with a portion of it.

Did this Court of Appeals in that case say to the receiver that he had no right to appeal from that order; that he was as much a representative of Francis Hook as of the mortgagee; that he should, as between these two parties, be indifferent and not a paatisan; that his duty was to all in common, that he should not become the advocate of one against the other? No such position was there taken by the Court; but, on the contrary, the Court of Appeals again not only sanctioned the receiver's appeal, *but upon it alone*, reversed the lower court and directed it to enter a decree dismissing the intervening petition.

If this right to appeal had not been declared by other courts, we submit that its recognition by this Court of Appeals in all the litigation which has heretofore grown out of this particular foreclosure proceeding is full justification of the continuance of that practice in this particular Court by this receiver, under

the advice of his counsel, especially in view of the fact that the appeal was taken under the express approval of the court that appointed him.

(e) Is not the demand of an unsecured creditor for priority just as much a claim asserted against the whole estate as one growing out of the negligence of a receiver?

In the case of *Thom vs. Pittard, 62 Fed. Rep., 232,* an attempt was made by a stranger to the cause, to diminish the estate, which was to be preserved by the court in the hands of a receiver for whomsoever should be ultimately entitled to it. The receiver, in his representative capacity, resisted the demand of the stranger, and although the court which appointed him ordered and directed him to pay such demand, he nevertheless appealed therefrom to the Circuit Court of Appeals for the Fourth Circuit. The argument of the appellee in that case was identical with the argument of the appellee in this, against the receiver's right to appeal from an order of that court which appointed him. In disposing of the contention the Court said:

> "But first we have a motion to dismiss the appeal as improperly granted, made by the appellee; the reason assigned being that the receiver is not in fact a party to the suit, and therefore not entitled to an appeal. It is claimed that the receiver, the officer and servant of the court, subject to its orders, without personal interest in the funds under his control, which are to be accounted for as the court may direct, is not to be permitted to

refuse to obey the court's orders by appealing from its decrees. *But we must remember that the receiver represents all the parties in interest.*

"*He stands for the railroad company, as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders.* While he has no personal interest in the proceedings, except to faithfully and impartially discharge his duties, *it is incumbent upon him to carefully protect the property confided to his keeping,* and to report to the court all matters connected therewith relating to its safe keeping and proper disposition, to obtain permission to sue for debts due, and to pay claims owing by him.

"Permission given the receiver to sue, or direction to him to defend, *should take with it the right to follow the suit to the court of last resort.* It is a plausible argument that counsel for appellee submits, but it is, we think, without real merit. While it is true that any of the defendants to said chancery suit, interested in the property of the railroad company, and in its proper distribution, as also plaintiffs, could have appealed from said decree in favor of appellee, proper steps therefor having been taken, *still it does not follow that the receiver, who was in fact the defendant, so far as the issues raised by the petition were concerned, could not also appeal.*

"In suits like the one in which this petition was filed, after the appointment of a receiver, *there is no one but him to defend the issues presented by such pleadings;* and it is at least not best to have it understood that the court's directions to him to defend, extend only to the court that hears the trial. *But so far as this proceeding is concerned, there is no difficulty, as the court below, whose officer the receiver was, gave him permission to prosecute still further the questions raised by the petition, when it approved his application for, and granted, this appeal.*

"We consider the question settled in favor of the right of a receiver to appeal in cases like the one we now examine, by the decision of the Supreme Court of the United States in *Farlow vs. Kelley, 108 U. S., 288; 2 S. C., 555; 131 U. S. Appen., cci.* It is insisted for the appellee that the right of the receiver, as an abstract question of law, to appeal was not involved in that case, but it must be admitted

> that the Supreme Court held that in cases where an appeal had been granted, the Appellate Court would entertain the same, and treat the order granting it as permission to appeal."

It will be found, also, in this case that the Circuit Court granted its receiver the right to appeal, and, as in the cases cited by appellee, the sole wrong committed by the receiver is in appealing from the direction of the court (on the theory that he is asserting his individual opinion against that of the court which appointed him), it would follow that such court would be the only one which had the right to complain. We do not find the Circuit Court in this case complaining, but on the contrary, it sanctioned the appeal, as was said in *Thom vs. Pittard, supra*, by the very fact of its granting the receiver's prayer for an appeal.

In distinguishing this case from *Thom vs. Pittard, 8 U. S. App., 597*, the Court of Appeals in its opinion (p. 3) says:

> "This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend a claim asserted."

We submit that in attempting to compel the receiver to respond in damages for the injuries sustained, *the employee was not asserting a demand which was in any sense more* against the whole estate, than an intervener who seeks to have his unsecured debt

paid out of the estate in the hands of a receiver. *Prima facie*, that estate, both the *res* and the income, belong to the mortgagee, and any decree or judgment which directs the receiver to pay money out of it diminishes it to that extent, and the estate, as a whole, is just as much interested in defending against one claim as against the other.

The claimants in both instances are strangers to the original litigation and both seek to diminish, to the extent of their claims, the subject matter of the original controversy. If it is not necessary for the parties to the original controversy to appeal from the demand of one, upon what theory should they be compelled to appeal from the demand of the other? Both are seeking to participate in the estate which the receiver has undertaken to preserve for the application of the decree which shall be entered on the determination of the issues made between the parties to original bill, *not on any issue which may be raised by the claim of some stranger to participate in the estate.*

In *Felton vs. Ackerman, 9 C. C. A., 457*, the Circuit Court of Appeals for the Sixth Circuit used the following language (p. 458):

> "The first question suggested is whether it is consonant with the relations which ought to exist between a receiver and the court appointing him, that he should be allowed to appeal from an order of the kind made here. We think it is. The learned Judge at the Circuit allowed the appeal, and we see no reason why he should not have done so. While it is true that the receiver is an arm of

> the court, in the administration of the property, yet, where persons intervene to obtain relief against him, because they cannot obtain full relief in any other forum, the issue raised by his answer to the petition, makes the proceeding an adverse one, in which the receiver represents the interests of the owners of the property of which he is temporarily in charge. If, as such representative, he feels aggrieved by an order of the court made in an adverse proceeding of this character, it is difficult to see why he should not be permitted to have the order of the court reviewed by the appellate tribunal, to which any other litigant may resort. Certainly, the owners of the property, if aggrieved by the order against the receiver, might appeal, and there would seem to be no justice in preventing the temporary custodian of their property from doing so.
>
> "As between parties to the action claiming an interest to the property which he is preserving, of course the receiver can take no part; but where the appeal is in the interest of the property, and therefore in the interest of all who shall thereafter be shown to have any right to the property, it is quite convenient and proper that the receiver should be allowed to conduct the appellate proceeding."

In determining who the court meant by the language, "as between the parties to the action, claiming interest to the property which he is preserving, of course the receiver can take no part," we must place such a construction on it as will make the whole sentence consistent and logical. By implying the word "original," so as to make it read, "as between the original parties to the action," etc., this is accomplished, and the position we occupy is sustained, since a controversy between the original complainant and defendant is the only controversy which could arise, from which an appeal would *not* be in the interest of the property; it would necessarily be directly

in the interest of one of the parties. The intervention of a third party is for the purpose of asserting a *demand against the property*, and when such a demand is resisted and defended, it can only be in the interest of the property.

(f) The court appointing the receiver made him the guardian of the interests of whomsoever should be ultimately entitled to the estate.

In its opinion, the Court of Appeals says that neither the trustee, bondholders nor purchasers are in court objecting, and therefore asks who made the receiver guardian of their interests. (R. p. 36) Our reply is, that when the bondholders, through their trustees, filed their bill to foreclose a certain mortgage, they represented to the Circuit Court, that, by virtue of a certain contract, they were entitled to have all of the property of the railway company sold to pay their certain indebtedness. The issues raised by this claim could not be determined at once, and for the purpose of preserving that property, so that if the court found the issues for the bondholders, this property would be in its possession to sell for their benefit; and so that, also, if the court found the claim of the bondholders was not sustained, it could restore the property to the company. It was, therefore, that the court entered an order directing the receiver to take possession of this property and, *primarily*, to preserve it

for whosoever should be ultimately entitled to it, as would follow from a determination of the issues raised on the bill and answer.

(g) In appealing from an order which diminishes the estate the receiver is not necessarily solely asserting the right of one creditor over another.

The theory upon which this receiver did appeal in this case, and in all of the cases arising out of this foreclosure above referred to, is that it was his duty to preserve the estate as against all strangers to the *original controversy*, and that as to the equity of any decree which was entered on an intervening petition directing him to part with a portion of that estate, he should have the judgment of the court of last resort. As to any controversy between the parties to the original bill, he had no interest; *but as to a controversy between a stranger to the cause and the estate*, he had a well defined interest, and was in duty bound to resist to the utmost the assertion of any claim which would diminish that estate. And we earnestly contend that the fact that the stranger, attempting to get possession of a portion of the estate, happens to be an unsecured creditor, and bases his demand on some equity supposed to be prior to that of the original parties, does not necessarily make the action of the receiver, in defending the estate, the assertion of the right of one creditor over another.

(h) He is simply asserting the right of the estate not to be subject to the demand made against it.

When the receiver appeals from an order which subjects the estate to the satisfaction of any demand, we submit that the manifest weight of authority is conclusive that he comes to the Court of Appeals as the representative of no particular party, *but of the estate*, and in asking the judgment of the Court of Appeals he is asserting the right *not of a party*, but of the estate for the benefit of whomsoever may be ultimately entitled thereto.

This position is adopted by the Court of Appeals when it says of him in this case (R. p. 36) that:

> "He has the right to appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate."

If this is so, then upon what ground was this appeal dismissed? Was it upon the ground that the demand of the intervener is not a claim against the estate?

(i) The claim of the intervener is one asserted solely against the estate.

Can the contention be sustained for one moment, that the claim of the Terminal Railroad Association is *not one* which is asserted against this estate, and *asserted solely against the estate?* In the intervening petition no relief is prayed against the railway com-

pany; no relief is prayed against the bondholders, nor the trustee, nor any other creditor; *but the form and substance of the demand is against the estate solely.* The intervening petition seeks no priority over other creditors; it simply asks the court to give it a portion of the estate *and ignores all parties.* (R. p. 26.)

(j) This right to appeal is announced by the two leading text writers on receivers.

At section *264 of High on Receivers*, a text writer who for years has been recognized by the courts of this country as eminent authority, we find the following:

> "It is held in actions against receivers in their official capacity that they cannot, either expressly or impliedly, waive any legal or equitable defense on which their principal might have relied had the action been brought against him. Receivers of an insurance company cannot, therefore, in an action brought against them to recover upon a policy of insurance issued by the company, waive or dispense with the conditions of the policy as to notice of loss. And although leave may be granted to sue a receiver, he is at liberty to assert any defense which he may have to the action, either by plea, answer or demurrer, *and he has the same right to appeal from an adverse judgment for the recovery of funds pertaining to his receivership,* as the party over whom he was appointed would have had."

On this same subject we find that *Beach*, the other well recognized authority on receivers, at *section 716*, says:

> "Every claim presented against a fund in the hands of a receiver, if contested before the court, *becomes in effect a suit against the receiver,* which is ended by final judgment

allowing or rejecting the claim, and any party to the contest dissatisfied with the result, may have the proceedings reviewed on appeal. *The receiver, as a party defendant to the action, has the same right to appeal from a judgment of the court affecting the interests of the estate represented by him*, that the party or corporation to whom the estate originally belonged would have had if the suit had been brought against them."

(k) An appeal by a receiver may be a meritorious rather than a censurable act.

High on Receivers, at *section 207*, says:

"It is important to observe that the general doctrine of courts of equity, recognizing a receiver as the officer or representative of the court from which he derives his appointment, *is not to be understood as limiting or restricting his rights in the management of a suit which he has once undertaken.* And after entering upon the litigation, he is regarded as being entitled to all the freedom of action of any other person, *and the fact that he appeals from a decision which is adverse to him is not of itself evidence of bad faith, or mismanagement of his trust, and may be a meritorious rather than a censurable act.*"

(l) Finally, the decided weight of authority, also, sustains the right of the receiver to appeal.

Thom vs. Pittard, 10 C. C. A., 352, s. c.; 62 Fed. Rep., 232.

Felton vs. Ackerman, 9 C. C. A., 457 s. c.; 61 Fed. Rep., 225.

Farlow vs. Kelley, 108 U. S., 288; 131 U. S. Append. c. c. i.

SECOND.

This action should be determined upon the record.

In its opinion, the Court of Appeals assumes that the estate has passed out of the hands of the receiver since this intervening petition was filed, as it says (R. p. 37):

> "The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from, the railway had been sold under decree of sale, and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand any moneys with which to pay the debt adjudged."

We are unable to say how much the conclusion of the Court of Appeals is based upon the foregoing assumption of facts which do not appear of record. But it is safe to say that that Court would not have inserted the same in its opinion, if it in no way affected its conclusion. We, therefore, feel justified in calling attention to the well settled principle that a court of review in determining any question presented to it will confine itself strictly to the record before it. It is true that those matters were not denied by counsel at the argument, but this Court, in *Hook vs.*

Bosworth, supra, said that although counsel suggested certain facts, yet, nevertheless, as they did not appear of record, it could not *assume them to be facts.*

Again, all of these facts assumed by the Court of Appeals must have occurred subsequent to the filing of the intervening petition, and that court has held, in *Empire Distilling Company vs. McNulla, 77 Fed. Rep., 700*, that while a petition of intervention need not be as formal as a bill of complaint, yet it should contain all the material facts relied on, and embodying by recital or reference, *so much of the record in the original suit as is essential;* and that proceedings taken in that original suit, after the filing of the petition which would fortify the right of the intervener, should be incorporated in the petition by amendment, *and if this is not done such proceedings cannot be noticed by an appellate court*, inasmuch as those subsequent proceedings are not properly brought before it on appeal.

The justice of this is at once apparent, for when the subsequent proceedings are made a part of the record, and one party asserts its intention of relying thereon, the other party has an opportunity of meeting in a formal and orderly manner the contentions asserted by the opposing party on account of said subsequent proceedings.

The conclusion which, it is apparent, the Court of Appeals based upon this premise of facts, not disclosed by the record, is found in the following language (R. p. 38):

> "By what authority may he assert the rights of a purchaser? *By what right does he undertake to prevent the enforcement of this claim against the purchased estate*, presumably by the decree of sale, charged as a lien upon it? He has no such right. He is, in so doing, an interloper, obtruding himself in breach of his duty where he has no right, and in a matter in which he is not concerned, and to sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has not the right to interfere."

We submit that this conclusion of the court can be based upon no other premise than the assumption of facts not in this record, viz, *that the only interested party was the purchaser at the foreclosure sale.*

THIRD.

The decisions of the state courts, relied on by intervener, are based on facts not found in this record.

In the Court of Appeals, counsel for intervener cited decisions from State courts in support of the proposition that a receiver has not the right of appeal. We have made a brief abstract of those cases

for the purpose of showing that the conclusions reached by those courts are based on a condition of affairs wholly different from that disclosed by the record in this case; and for that reason submit that they have no application to the case at bar.

The court will find, not only that the proceedings, in which those receivers were appointed, were for the dissolution of corporations and the winding up of the affairs of individuals, partnerships and lunatics, but that the receivers were appointed in the first instance for the express purpose of conserving the estate for the benefit of *all* creditors, secured and unsecured, and for the distribution of such estate between them, *pro rata*.

The court will also find that in two of the citations the receiver's appeal was dismissed on the ground that *he was attempting to offset a claim of his own against the trust estate*, and that the quotation from *Thompson on Corporations*, in which he so positively asserts that receivers have no right of appeal in matters concerning the distribution of the estate, *is based solely on those two cases*.

In *Herrick vs. Miller, 123 Ind., 305*, it appears that Herrick was appointed receiver after a decree of sale had been entered in a suit to foreclose a real estate mortgage. He was appointed for the express purpose of receiving the rents and profits pending the sale and during the year of redemption. The receiver reported

to the court that up to the date of sale the rents collected amounted to $17.23, claiming credits for $12.40. The court refused to approve this report, and the receiver then filed another showing in addition, rents collected during the year for redemption to be $92.12. Miller, the complainant in the foreclosure, filed a motion for an order on the receiver to pay the amount over to him. The receiver resisted this motion on the ground that he had bought the property after the foreclosure, and was therefore entitled to the profits earned by the land during the year for redemption The court sustained the motion of Miller, and required the receiver to pay over the money. From this the receiver appealed. The real ground upon which that appeal was dismissed is found in the following language of the Court:

> "When ordered to pay the money to any particular person he will not be allowed to offset a claim due to him personally, since to allow this would render the disposition of the money as uncertain as before the receiver's appointment, and would defeat the very object of his appointment."

In that case there was no question as to the priority of rival creditors of an insolvent, to the estate; the real question was whether a receiver could become a purchaser of property pertaining to his trust, and could offset his claim in that behalf against complainant. Everything said by the Court not necessary to that determination is *obiter dicta*.

Stanton vs. Andrews, 18 Ill., App. 552, originated in an intervention filed by Andrew's in a creditor's suit. It appeared that all the funds that could be realized from the insolvent judgment debtor had been distributed in pursuance of a stipulation entered into by all the parties interested.

The claim of Andrews was for royalties accruing on work finished by the receiver. The receiver joined issue and on hearing the master found in favor of the petitioner, but his report was overruled by the court, on the sole ground that petitioner should have sued at law instead of intervening in the creditor's suit. From this decree the intervener appealed and in reversing the lower court, the Supreme Court not only sustained the remedy pursued, but also affirmed the claim.

It was then, after the petitioners right to the amount claimed had been sustained by the higher court, and by agreement of all creditors and parties in interest a sum had been set apart for satisfying the claim, that the receiver refused to pay it.

The only ground upon which the receiver based his right to contest the allowance was an order which the lower court entered while the case was pending on the first appeal, setting aside a certain sum to satisfy petitioner's claim, and *providing that the receiver should retain the residue, if any, as additional compensation for his services.*

The court says:

> "It is apparent to us that this action on his part is dictated by that provision of the order of January 4th, 1896, which constructively *gave the receiver a contingent interest* in the sixteen hundred dollars set apart for appellee's claim. We cannot but regard that part of the order as injudicious. It placed the receiver in a position where *his interest was in direct conflict with his duty.*"

So it will be seen that the controlling question in this case was the same as that in *Herrick vs. Miller, supra,* viz: that the receiver could not assert a personal claim to the trust property. And in addition we find that the court had marshalled the assets of the insolvent.

Section 6941 of Thompson on Corp. is based *solely* on the two foregoing cases, and is therefore entitled to no more weight, nor to be decisive of any other principle, than they are.

In *3d Md. Ch. (Re Colvin) 278,* a Chancery Court appointed a Committee for a Lunatic. Shortly afterwards the lunatic died and the court appointed a receiver to take charge of her property pending a litigation over her will. Later on, the Orphans' Court appointed an administrator, and the question was, who was entitled to the possession of the property. There was no question of the receiver appealing from any order, distributing the assets in his hands, between rival claimants.

In *Chicago Title and Trust Company vs. Caldwell, 58 Ill., App. 219*, the express object of the original bill was to dissolve an insolvent corporation and distribute its assets *pro rata* among its creditors. The lower court ordered the claim of Caldwell to be allowed against the estate for $850.

> "To be paid *pro rata* with the claims of general creditors, and that the receiver pay to said Caldwell as dividends upon said sum the same percentage thereof as paid upon other claims of unsecured creditors."

The case of *Strauss vs. Carolina Interstate B. & L. Association* we do not find reported at *24 S. E. Rep. 740*, as cited by appellee, and therefore cannot state the nature of the proceeding.

Beverly vs. Brooke, 4 Gratt. 208, also appears to be a controversy in which the court was administering the property for the benefit of *all creditors*, and involved no question of a receiver's right to appeal from an order distributing the assets between rival creditors.

In *People vs. Security Life Insurance Company, 79 N. Y., 267*, it appeared that the receiver obtained an order requiring all creditors of the insolvent corporation to exhibit their claims within a specified time. Before the expiration of the time, he addressed a circular to the policy holders to the effect that policies in force on the books of the company would be allowed without subjecting their holders to further

proof; mislead by such circulars, the holders did not make further proof of their claims. These were objected to by other creditors, and were accordingly rejected by the referee, to whom the cause was referred to take proof *as to distribution of the assets*. But before any dividend had been made the receiver applied for and obtained an order giving two months further time within which such claims could be presented and established before the referee.

On this state of facts the court says:

> "The learned counsel for the appellants contend that the receiver has no standing in court; that he can be heard only as to his fees and compensation, and had no right to be heard upon the motion which resulted in the order appealed from; and, second, that the court itself had no power to grant the order. *Upon both questions we think he is in error.* Since the receiver is an officer, or as he is sometimes called, 'the hand,' of the court, *it would be singular if he could not at any time go to it* with his complaint, *or for instructions in regard to any matter touching the fund placed in his custody, and more especially when,* as in the case before us, *it is in danger,* through his own error, *of being unfairly distributed.* He is not to advocate the cause of one claimant as against another—between them he is indifferent, owing a like duty to all, *and for that very reason* should, as far as possible, see to it that each has an equal opportunity to enforce his claim. *He stands as their representative and is bound to give them reasonable aid.*"

It is not to be forgotten that the above case was cited by intervener to support its contention that a receiver has no right of appeal, and we submit that it sustains the contrary.

Dorsey vs. Seibert, 93 Ala., 312, comes nearer presenting a state of facts similar to the case at bar.

But there is this vital distinction; first, it was a suit by a *general creditor* against the railway company, and therefore the funds arising from its operation *belonged prima facie* to general creditors who might intervene; second, the particular creditors did not intervene until after the property was sold, title made, and proceeds placed in the hands of the receiver for distribution.

It is hardly necessary to say that nothing was further from the mind of counsel than to trouble the Court of Appeals with mere moot questions. *Thom vs. Pittard*, in the light of *Farlow vs. Kelly*, to say nothing of the support found upon full review herein of text writers and adjudicated cases, seem ample justification for the appeal itself in the name of the receiver; and if a receiver's rights in the management of a suit are to be restricted by his being construed as the "hand," and the court which appoints him, as the "head," it follows that "if the order granting the appeal should be treated as permission to appeal," then there is no rebellion of the hand against the head.

In conclusion, we, therefore, submit that the weight of authority sustains our contention that, in cases in which the courts have taken possession of railroad property upon the application of a mortgagee seeking to foreclose its mortgage, the receiver represents no party but the estate itself, and that it is his duty to resist every attempt on the part of a stranger to diminish the same by depriving him of any portion of

it, and that to retain the fullest possession he has the right to present to the court of last resort, for review, any decree made by the lower court.

Again, that the repeated recognitions, and sanctions, by this Court of Appeals of this particular receiver's right to appeal, in this particular foreclosure proceeding, and the express authority of the court appointing him, justified his appeal in this particular case.

FOURTH.

Before an unsecured creditor can displace a vested mortgage lien, he must bring himself within the well defined rules laid down by the Supreme Court.

We contended in the Circuit Court, and in the Court of Appeals, that the intervener was not entitled to a priority in this case, for the reason that there had been no diversion of the current earnings of the railway company, nor a diversion of the income of the receivership, to the benefit of the mortgage bondholders In fact, the intervener did not rely on such diversion for its right, but rested wholly on the provision in the order appointing the receivers, directing them to make certain payments This order created

no vested right, and each demand must stand or fall on its own merits. From a hasty review of the decisions touching this question, the rights of the parties might not appear to be settled on a definite basis; but from a thorough analysis of the cases it will clearly appear that the courts have acted on well defined equitable principles.

(a) The rule giving certain unsecured claims priority over a mortgage lien is founded on diversion.

The practice of postponing the lien of a mortgage on railroad property to the payment of certain unsecured creditors most probably originated in the Seventh Circuit. At least it was in that circuit that such practice first received judicial sanction, after being contested. In its inception this was considered nothing more than a "policy," and not until March, 1879, when the Supreme Court of the United States rendered the decision in the case of *Fosdick vs. Schall*, did it attain the dignity of a "rule." Since then it has gradually evolved into a "doctrine," the general principles of which are now firmly grafted on our equity jurisprudence, although many of the details as to pleading and practice remain to be announced by the court.

As a policy it has obtained in some jurisdictions since as early as 1850, but merely by sufferance or consent of interested parties. The early history of

the financial embarrassments of railroads shows that after being in the hands of a receiver for a short period they were usually turned back to the company, and through the protection of the court a foreclosure was often avoided. Under such circumstances the payment of unsecured creditors worked no hardship to the mortgagees, but materially enhanced the value of their securities, and they had neither reason nor desire to attack the policy.

Later on in the era of railroading, when competition became greater, and success harder to attain, it appeared that such corporations could not recoup their financial standing by merely going into the hands of a receiver; but instead, it began to mean a foreclosure, sale, and reorganization. Then it was that the interest of mortgagees began to be most seriously affected, and to protect that interest they were compelled to attack this policy.

The first written opinion rendered on this question to be found in the books, is recorded in *8 Bissell, 315*, decided in 1878, wherein Judge Drummond stated the grounds upon which he had sustained the "practice."

It will be seen that in this very first case (*Turner vs. Indianapolis Railway*), while the right to displace mortgage liens is rested on the general powers vested in the discretion of a chancellor, yet one of the most potent, and the most logical reason for exercising it, is based on the fact that:

> "It was found in many cases that those who had control of the railways, instead of paying the current operating expenses of the companies, would postpone the payment of the same, sometimes for many months, in favor of the interest due on the mortgages, which they would discharge, in the hope, apparently, that a more favorable time in the business of the roads would enable them to make up the deficiency."

We have quoted from this case, because it is of no little significance, that in the very origin of this practice is to be found that condition of facts, which we contend should be averred and proved before this doctrine can be applied.

(b) In the illustrative cases diversion is made the test.

In the classification of these decisions, the case of *Fosdick vs. Schall, 99 U. S., 235*, has been often cited as the pioneer, presumably because it is the first recognition of this practice as a doctrine by the Supreme Court; yet, in view of the earlier case of *Turner vs. Indianapolis, Bloomington & Western, supra*, which manifested the existence of the doctrine as a policy, many years prior, we feel justified in classifying *Fosdick vs. Schall* as illustrative. And in this connection it is a curious fact, that although universally cited by claimants in support of their right to displace mortgage liens, the court in this case refused just such relief, because the facts before it would not warrant the application of the doctrine.

Now in this first illustrative case we find that the Supreme Court has selected, from the many reasons assigned by the Circuit Court in *Turner vs. Indianapolis, Bloomington & Western, supra*, the single test of "diversion." as necessary to be established by the facts and circumstances of each particular case. This is shown in the following language:

> "The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debt for labor, supplies, equipment and improvements are permitted to accumulate, in order that bonded interest may be paid and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, *are kept from those to whom in equity they belong, and used to pay the mortgage debt.* The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment and useful improvements. Every railroad mortgagee in accepting his security impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order *that what is due from the earnings to the current debt shall be paid by the court* from the future current receipts before anything derived from that source goes to the mortgagees."
>
> * * * * * * * * * * * *
>
> "We think, also, that if no such order is made when the receiver is appointed, and it appears in the progress of the cause that bonded interest has been paid, additional

equipment provided, or lasting and valuable improvements made *out of earnings which ought in equity to have been employed to keep down debt for labor, supplies and the like*, it is within the power of the court to use the income of the receivership to discharge the obligations which, *but for the diversion of funds*, would have been paid in the ordinary course of business. This, not because the creditors to whom such debts are due have in law a lien upon the mortgaged property or the income, but because, in a sense, the officers of the company are trustees of the earnings for the benefit of the different classes of creditors and the stockholders; *and if they give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts*, so use the income which comes into its own hands as, if practicable, to *restore the parties to their original equitable rights*."

* * * * * * * * * * * *

"No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must to a greater or less extent influence the Chancellor when he comes to act."

"*The power rests upon the fact*, that in the administration of the affairs of the company *the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to the restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion.* If, in the exercise of this power, errors are committed, they, like others, are open to correction on appeal. All depends upon a proper application of well settled rules of equity jurisprudence to the facts of the case, as established by the evidence."

In the case of *Union Trust Company vs. Souther, 107 U. S., 591*, is to be found another form of diversion which illustrates the fact that no "fixed and inflexible rule has been laid down for the government of courts in all cases," but it is sufficient, yet impera-

tive, that it be shown that the money which should go to the general creditors has been *diverted* to the benefit of the mortgagees. In that case the court said:

> "The income of the receivership, instead of being applied in accordance with the order to pay the debts for the supplies and labor, was used with the consent and, it may fairly be inferred, at the request of the bondholders, to buy additional grounds, rolling stock, etc., and to make permanent improvements, thus adding to the value of the property, which was afterwards sold. There is nothing whatever to indicate that in thus using the income it was the intention of the court to revoke the original order. It seems to have been found, in the administration of the cause, that by using the income to add to the value of the fixed property, the interests of all parties would be promoted, *and so the fund which in equity belonged to the labor and supply creditors, was for the time being diverted from them and put into improvements and additions, the proceeds of which are now in court.* It is not to be presumed that this diversion would have been authorized if the value of the property added to and improved was not to correspondingly increase. Clearly, therefore, on the face of the transaction, the fund in court represents in equity *the income which belongs to the labor and supply creditors, as well as the mortgage security*, and there was no impropriety in appropriating it as far as necessary to pay the creditors specially provided for when the receiver was appointed. Such a practice, under proper circumstances, was approved in *Fosdick vs. Schall, ubi supra*, and seems to be eminently just."

In the case of *Wood vs. Trust Company, 128 U. S., 416*, the necessity of showing the diversion is most strongly stated in the following language:

> "The argument is unsound. There are several answers to it. First, it overlooks the vital distinction between a debt for construction, and one for operating expenses. The doctrine of *Fosdick vs Schall* is applicable wholly to the latter class of liabilities. * * * Secondly, it overlooks the important fact that the doctrine only applies where there is a diversion of the income of a 'going concern' from

the purpose to which that income is equitably and primarily devoted, viz, the payment of operating expenses of the concern. In other words, the income must be first devoted to the expense of producing the income. In this case it is not pretended that the money used in paying the 117 coupons in question was income of the water works company."

Again, in *Burnham vs. Bowen, 111 U. S., 776, it was contended on behalf of the bondholders that* "no part of the income before the appointment of the receiver was used to pay mortgage interest, or to put permanent improvements on the property, or to increase the equipment, there was no such diversion of the funds, belonging in equity to the labor and supply creditors, as to make it proper to use the income of the receivership to pay them." And before the court decided that the vested lien could be displaced, *it found there had been such a "diversion."* The court there said:

"When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, *there was such a diversion of what is denominated in Fosdick vs. Schall the 'current debt fund,' as* to make it proper to require the mortgagees to pay it back."

* * * * * * * * * * * * *

"We do not now hold, any more than we did in *Fosdick vs. Schall, or Huidekoper vs. Locomotive Works, 99 U. S., 260,* that the income of a railroad in the hands of a receiver, for the benefit of the mortgage creditors who have a lien upon it under their mortgage, can be taken away from them and used to pay the general creditors of the road. *All we then decided, and all we now decide is, that if the current earnings are used for the benefit of the mortgage creditors before current expenses are paid,* the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use."

In the case of *Farmers' Loan and Trust Company vs. Green Bay Railway, 45 Fed Rep., 664*, it was sought to postpone the lien of the mortgage in favor of a claim against the railway company for causing death of petitioner's intestate. There Mr. Justice Jenkins, in disallowing the claim, stated the principle as follows:

> "The principle upon which equity acts in disallowing certain claims, priority of payment over precedent mortgage in the case of railways, is settled by repeated adjudication of the Supreme Court. The gross income arising from the operation of a railway should be first applied to the payment of the expense of operation, proper equipment, and needful improvements. If the income be diverted to the payment of bonded interest, in disregard to the payment of such expenses, there should be restoration to original equitable right. Failing diversion, there can be no restoration. The amount of restoration is dependent upon the amount of diversion. The power rests upon the fact of diversion of a fund belonging in equity to the general creditors, or some of them."

In the case of *American Loan and Trust Company vs. Railroad Company, 46 Fed. Rep., 101*, in disallowing a claim for construction, the court, at page 104, said:

> "Finally, in the case of *Wood vs. Deposit Company, 128 U. S., 421*, the Supreme Court expressly declares that 'the doctrine of *Fosdick vs. Schall* is applicable wholly to debts incurred for operating expenses, and does not apply where it is a question of original construction, and further, that it only applies where there is a diversion of the income of a going concern from the parties to which that income is equitably and primarily devoted.' It does not appear from the record in this case, nor otherwise, that prior to the receivership there was any diversion of current earnings or funds which should have been applied to the payment of intervener's claim, to the payment of interest on the

bonded debt, or any diversion whatever of any earnings of the property which should have been applied to the payment of intervener's claim."

Again is this test of *diversion* recognized and applied in the case of *Union Trust Company vs. Illinois Midland Railway Company, 117 U. S., 432*, where, at page 479–80, the court says:

"The commissioner and the Circuit Court rested the allowance of these certificates on what was said by this court in the case of *Fosdick vs. Schall, 99 U. S., 235, 253, 254*, which views were applied in *Burnham vs. Bowen, 111 U. S., 776*, to the effect that when the current income of a railroad in the hands of a receiver *is diverted to the improvement* of the property by the receiver, and debts for operating expenses are not paid, provision should be made, in foreclosing a mortgage on the road, to pay such debts out of the proceeds of the sale of the property. See also *Union Trust Company vs. Souther, 107 U. S., 591.*"

(c) The only other cases in which a mortgage lien has been postponed are those in which the doctrine of estoppel is applicable.

We do not desire to have the court understand us as contending that diversion is *absolutely the only ground* upon which rests this power of a court of equity to displace mortgage liens in favor of unsecured creditors in cases of insolvent railroads. Our argument has so far been made solely with reference to the facts in this particular case. We are acquaninted with that other class of cases in which priorities are based on the doctrine of estoppel.

We also are aware that some text writers have attempted to add still another ground upon which to rest this power, making, in all, three—"Diversion of Income," "Estoppel," and "Necessity." We submit, however, that a close analysis of the decisions will show "Necessity" to be simply one of the elements of "Estoppel," and that the two are really the component parts of one.

Simply for the purpose of distinguishing between the case at bar, and those based on estoppel, we desire to call the court's attention to a few leading cases illustrative of the latter.

In *Farmers' Loan & Trust Co. vs. Green Bay Co., 45 Fed. Rep., 664*, the court, after stating the doctrine based on the diversion of income, said:

> "The exercise of this equitable power in the court is not, however, dependent solely upon diversion of current earnings to payment of bonded interest, leaving current expenses unpaid, but is exercised as well in consideration of the fact that, *in case of failure of the trustees to take possession upon default*, it is indispensable to the preservation of the property that it should be operated. It must be kept a going concern. The expense of such operation and maintenance within a limited time prior to the receivership is therefore allowed priority."

In *Union Trust Company vs. Souther, 107 U. S., 591*, this court said:

> "The right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principal and interest, instead of current expenses. * * * * Many other considerations may make such order reasonable, and this case furnishes a direct

example. The first default in the payment of interest under the mortgage occurred in October, 1873. The bondholders did not see fit to take possession, which they had the right to do when the default had continued six months. On the contrary, notwithstanding no payments of interest were made, they allowed the company to operate the road and incur obligations therefor, until December, 1877. This was evidently in the hope that their condition would be improved by the delay. * * * * There cannot be a doubt that it was for the interests of the bondholders that the road should be kept in operation, and as they did not see fit to take possession while it could only be operated at a loss, it was certainly not an abuse of judicial discretion for the court to order, as a condition of granting their application for a receiver, that debts incurred by the company in thus protecting the security, should be paid from the income of the receivership."

Again, in *Burnham vs. Bowen, 111 U. S., 776*, the mortgage bondholders were never paid any interest, but the company was allowed to remain in possession and operate the road for a number of years. By reason of that fact, this court there said:

> "The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them."

It is to be observed that the cases in which the question of "Necessity" is most discussed, and which text writers cite as supporting "Necessity" as a distinct ground upon which to rest this power, are cases in which the trustee had failed to take possession upon default in interest; and that the "Necessity" referred to is that of keeping the railroad a going concern

during the period the trustee failed to act. This necessity, of course, is two fold; first, to serve the public, and, second, to preserve the mortgage security. But behind both is the fact that during the time at which this necessity existed, the trustee permitted the railroad company to do what it would have had to do had it taken possession of the property, viz, to meet these necessities by incurring obligations for the operation of the property during that time. In other words, that the trustee, by remaining inactive, led the general creditors to believe that the interest was being paid, and thus permitted the company to become its agent for the operation of the road. It is, therefore, that we contend that the whole reasoning is comprehended by the single ground of "Estoppel."

(d) The doctrine of estoppel can not be applied to the case at bar.

In this case the trustee procured the Circuit Court to take possession of the property twenty days after default in the payment of interest, (R. pp. 5 and 18) and we feel justified in asserting that it would be impossible, except upon preconcerted plans adopted by both the trustee and railway company, for a trustee to be more active in seeking remedy than this one was. On this question Judge Jenkins said, in *Farmers' Loan and Trust vs. Green Bay, supra:*

> "The bonds of American railways are scattered throughout Europe, and are held in many hands. It requires much time to institute concerted action by the holders after default in the payment of interest."

In *Union Trust Co. vs. Souther, supra*, the bondholders did not see fit to take possession until four years after default, and in *Burnham vs Bowen, supra*, the trust deed was executed in June, 1871, and "no terest was paid on these bonds, but the company remained in peaceable possession and operated its road until the early part of the year 1875," when suit to foreclose was begun So in all these "estoppel" cases it will be found that the time during which the trustee failed to act is not measured by days, but by months and years. For this reason we are hardly justified in anticipating that opposing counsel will contend that the doctrine of estoppel can be applied to the case at bar.

(e) If the right of recovery depends on diversion, the same must be alleged and proved.

In *Fosdick vs. Schall, supra*, this court said:

> "All depends upon a proper application of well settled rules of equity jurisprudence to the facts of the case, as established by the evidence."

If, therefore, the facts which constitute the diversion have not been alleged, how can a court apply the rules of equity jurisprudence and grant relief?

(f) Where there has been no diversion there can be no restoration.

Did this court mean absotutely nothing when it said in *Fosdick vs. Schall*, that "it follows that if there has been in reality no diversion, there can be no restoration;" and when again, in *Burnham vs. Bowen*, in reaffirming and construing *Fosdick vs. Schall*, it said: "All we then decided, and all we now decide is, that IF the current earnings are used for the benefit of the mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the *restoration* of the fund which has thus been *improperly applied* to their use;" and when in the very late case of *St. Louis, Alton & Terre Haute Railway Company vs. Cleveland Railway Company, 125 U. S., 658*, after referring to almost every case which it had decided touching this question, it again said:

> "The rule governing in all these cases was stated by Chief Justice Waite in *Burnham vs. Bowen*, as follows: 'That IF the current earnings are used for the benefit of the mortgage creditors, * * * the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use.' *There has been no departure from this rule in any of the cases cited. It has been adhered to and reaffirmed in them all.*"

Thus always has the diversion been made the condition precedent to the restoration, and it follows unquestionably that unless there has been a diversion there can be no restoration.

(g) If the amount of restoration depends upon the amount of diversion, how can relief be granted unless the latter is alleged and proved?

That the *amount of restoration* does depend upon the *amount of diversion* was announced in the earliest case, when, in *Fosdick vs. Schall*, the Supreme Court said:

> "What is done, therefore, must be with a view to a *restoration* by the mortgage creditors of that which they have inequitably obtained. *It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of diversion.*"

In the case of *St. Louis, Alton & Terre Haute Railway vs. Cleveland Railway, supra*, this court announces that it is absolutely necessary to prove a diversion before the mortgage lien can be postponed. There the propositions on which counsel for intervening petitioner based its right to the relief prayed for are stated as follows:

> 1. "Because it is an *unpaid operating expense* of the Indianapolis and St. Louis Railroad Company, there having been gross earnings abundant to pay all operating expenses, including the rent of the leased line.
>
> 2. "Because it is a debt justly due to the petitioner *as a connecting line.*
>
> 3. "Because gross earning lawfully applicable only to operating expenses, until every operating expense has been fully paid, have been diverted to the benefit of the bondholders of the petitioner in payment of bonded interest, and in adding increased value to the mortgaged property by additions and improvements, to an amount sufficient to have paid the debt, now due to the petitioner, many times."

In that case the petitioner attempted to show a diversion, and, considering the propositions relied upon by it, in connection with the facts established by the evidence, this court said:

> "But none of these reasons, standing by themselves, are sufficient. It is undoubtedly true that operating expenses, debts due to connecting lines growing out of an interchange of business, and debts due for the use and occupation of leased lines, are chargeable upon gross income before that net revenue arises which constitutes the fund applicable to the payment of the interest on mortgage bonds. But here there is no question in respect to current income. The fund in court is the proceeds of the sale of the property, and represents its *corpus*; and it cannot be claimed that ordinarily the unsecured debts of an insolvent railroad company can take precedence in the distribution of the proceeds of a sale of the property itself over those creditors who are secured by prior and express liens.
>
> "There are cases, it is true, where, owing to the special circumstances, an equity arises in favor of certain creditors of an insolvent railroad corporation, otherwise unsecured, by which they are entitled to outrank in priority of payment, even upon a distribution of the proceeds of a sale of the body of the property, those who are secured by prior mortgage liens. Illustrations and instances of these cases are found in *Fosdick vs. Schall, 99 U. S., 235; Miltenberger vs. Logansport, C. & S. W. R. Co., 106 U. S., 286; Union Trust Company vs. Souther. 107 U. S., 591; Burnham vs. Bowen, 111 U. S., 776; Union Trust Company vs. Illinois Midland Railway Company, 117 U. S., 434; Dow vs. Memphis & L. R. R. Co., 124 U. S., 652; Sage vs. Memphis & L. R. R, Co, 125 U. S., 361; and Union Trust Company vs. Morrison, 125 U. S., 591.* The rule governing in all these cases was cited by Chief Justice Waite in *Burnham vs. Bowen, 111 U. S., 776, 783*, as follows: 'That if current earning are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has thus been improperly applied to their use.' *There has been no departure from this rule in any of the cases cited. It has been adhered to and reaffirmed in them all.*

"Admitting, therefore, that the reasonable rent of the leased line accruing to the petitioner was a proper charge upon the gross income of the Indianapolis & St. Louis Railroad Company, as a part of its current operating expenses, before any net income could arise applicable to the payment of the interest on the mortgage bonds, *it must still be shown to entitle the petitioner to the relief prayed for, that the arrearage due on account thereof has arisen by the diversion and misappropriation of the fund that ought to have been applied to its payment for the use and benefit of the mortgage bondholders.* Counsel for the petitioner undertake to do this, and insist that upon the proofs in this case it satisfactorily appears that such diversion an misappropriation have taken place to its injury and to the advantage and benefit of the bondholders claiming the fund in court for distribution."

The Court then examines carefully the alleged diversions and misappropriations, and finding that there has been no diversion proved, decrees that there is nothing to be restored. We submit that even if this case stood by itself, it would be absolutely conclusive of the necessity of alleging and proving a diversion.

In the very late case of *Virginia and Alabama Coal Co. vs. Central Railroad and Banking Co., 170 U. S., 355*, decided May 9, 1898, the necessity of alleging and proving a diversion in such cases is applied. The controversy in that case was as to the priority of a claim for coal purchased for and used in operating a railroad; the coal having been purchased not by the owner of the road, but by another party who was in control and operation thereof under a lease. This Court there held that such claim was entitled to priority, but did so only after having fully satisfied itself

that the evidence in the record showed that there had been a diversion of the surplus income of the receivership to the betterment of the mortgaged premises.

It was contended in that case that there had been no diversion of income prior to to the receivership, but this court held that if it be shown that there was a diversion of the *surplus* income of the receiver, that that was sufficient to create an equity in favor of the intervener. The Court there saying: (P. 369.)

> "Whether, however. there was a diversion of income before the receivership; inuring to the benefit of the bondholders, the equity in favor of the Coal Company for payment out of subsequent income, as we have seen, survived and attached to the property when it was taken possession of by the receiver; and if a *surplus* of income was created by the operations of the road under the receiver *sufficient* to satisfy the claims of the interveners, the right to demand that the *surplus* income be applied in satisfaction of the claims in question was undoubted. *From the evidence* we find that there was such surplus."

From this decision it is apparent that the Supreme Court intends that even if there had been no diversion of the income during the operation of the road by the company prior to the receivership, that, nevertheless, the supply claimant has a continuing equity which shall become a charge on the *surplus* income of the receivership, if there be any *surplus*, and if that *surplus* be diverted, from the payment of such claims, to the betterment of the mortgaged premises. But that the language of its opinion may not be misunderstood. at page 370 it is said:

"In concluding that the claims of the interveners were entitled to priority out of the *surplus* earnings which arose during the control of the road by the court, we must not be understood as in any wise detracting from the force of the intimations contained in the recent utterances of this court in the *Kneeland, 136 U. S., 89*, and *Thomas vs. Western Car Co., 149 U. S., 95*, cases as to the necessity of the court of equity *confining itself within very restricted* limits in the application of the doctrine that in certain cases a court having a road or fund under its control may be justified in awarding priority over the claims of mortgage bondholders to unsecured claims originating prior to a receivership."

FIFTH.

Appellee relies solely on the order appointing the receivers for its right to priority.

The *only ground* relied on by appellee for its right to the relief sought, is that its claim "may be allowed and ordered to be paid *under the order of the Court heretofore made herein* directing the payment by the receiver of debts incurred by the Chicago, Peoria & St. Louis Railway Company within six months prior to the appointment of the receiver." (R. p. 21.)

The order appointing the receivers authorized them as we have seen, to "collect and receive the tolls, rents, moneys, issues and profits of said premises and property as covered by this order, and out of the same they shall put, maintain and keep said property in good repair, and shall further pay," among other

things, "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past."

(a) That order created no vested right.

Admitting, *arguendo*, that the claim in this case is for materials and supplies furnished within the six months, and, therefore, comes clearly within the order appointing the receivers and directing them to make certain payments, we submit that that in itself could in no way affect either this particular petitioner's right of recovery, or a valid defense which might exist to the claim. In the very first place, the order appointing the receivers is interlocutory, not final; cannot be appealed from, and therefore, may be modified.

On the other hand, in support of the proposition, that the order of the Court is sufficient to establish and administer principles of equity, it has often been contended, that a court in appointing receivers has a right to impose conditions, and having done so, if the mortgagees take no action to prevent the full operation of the order, they may be considered as having acquiesced therein, and are thereby bound.

Curiously enough, also, this contention has its basis in the language used by Chief Justice Waite in the case of *Fosdick vs. Schall, supra*, which, if it stood by itself, might go far to make the contention plausible. Fortunately, though, in this very same case, we

find the venerable Chief Justice limiting and modifying that assertion by language capable of but one construction. After discussing the ordinary way in which receivers of railroads are usually appointed, and the composition of the order to be entered at that time, he goes further and says that although each case will necessarily have its own peculiarities, yet as the power to make these payments rests upon a diversion, that;

> "Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of diversion. If in the exercise of this power, *errors are committed*, they, like others, are open to correction on appeal. *All depends upon the proper application of well settled* rules of equity jurisprudence to the facts in the case, as established by the evidence."

From the above it is plain that the order appointing the receiver is not intended to adjudicate claims upon which no evidence has been introduced. As the Court says, if any errors are committed they are open to correction on appeal. Now, inasmuch as an appeal does not lie from an interlocutory order, we cannot assume that the Supreme Court intended an appeal from the order appointing the receiver, for such construction of its language would be meaningless. The only appeal which could have been contemplated is an appeal from a final order entered in the prosecution of each specific claim upon which sufficient evidence has been produced to allow the court to act intelligently thereon.

While the courts may have attempted in earlier adjudications to announce as a principle, that a chancellor has the right to make a receivership conditioned on the payment of certain claims; latterly, they have taken great pains to denounce it as utterly unsound. In *Kneeland vs. Trust Company, 136 U. S.*, this court said:

> "When the court appoints a receiver of railroad property *it has no right to make that receivership conditioned on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority.*"

This same question was before the Court of Appeals on the same order in the case of *Mather Humane Company vs. Anderson and Bosworth, 76 Fed. Rep., supra.* There, as here, petitioner relied on the order of the court appointing the receivers for its right to payment, and the court, in disposing of that contention, said:

> "Car rentals are not 'materials and supplies,' and besides, *the order being in that respect interlocutory, is not controlling of the subsequent action of the court. It created no vested right, and if wrong, was to be disregarded.*"

(b) Each case depends upon the proper application of well settled rules of equity to the facts as established by the evidence.

That this construction is the only logical one is supported by the last sentence in the above quotation from *Fosdick vs. Schall*, where the court, as though to leave no doubt, says: "All depends upon the proper

application of well settled rules of equity jurisprudence *to the facts of the case, as established by the evidence.*" As to this it is sufficient to say, that it is a well settled practice that upon the appointment of a receiver no evidence is introduced as to claims which have accrued in the six months preceding. Of its very nature such a thing is impossible.

The above construction, that each case must depend upon the evidence introduced to support it, and not merely upon the order appointing the receiver, has been announced in *Trust Company vs. St. Louis Railroad, 41 Federal Reporter, at page 552*, where it is said:

> "Circuit Judge Brewer appointed a receiver and directed 'that the said receiver pay, out of any income or revenue which may come into his hands, all just claims and accounts for labor, supplies, professional services * * * that have been earned or matured within six months prior to the date of this order.' *This order was not intended to be final. Its purpose was to confer on the receiver a present authority to pay wages due employes and such like claims, the payment of which ought not to be delayed. The final order to be made on the subject was left for future action.*"

Can it be contended, then, that the order which is usually entered on the appointment of receivers is to be taken as final and conclusive? We say not. On the contrary, we insist that it is simply arming the receiver with the power which would be necessary to preserve the property as a "going concern," while in his custody, if the persons to whom that class of debts are due from the railroad company should refuse to

continue in the employment of the receiver, unless their claims were paid. It simply vests in the receiver the authority to pay those claims, if in his judgment their payment is necessary and indispensable to the maintenance of the property under the receivership.

Again, in *Blair vs. St. Louis Railroad, 22 Federal Reporter, at page 474*, the court said:

> "It is true that the court, as a condition of the appointment of a receiver, may, in his discretion, require the payment of certain claims, *but that discretion is not an arbitrary one*. It may not require the payment of any claims that it desires, *but only such claims as it is equitable should be paid*—that in equity are paramount to those of the mortgages, *and if it is equitable that these claims should be paid prior to the mortgage debt, then what difference can there be in the mere making of an order therefor? In all cases the payment of such claims rests on the fact that it is equitable that they should be paid, and oftimes this equity can only be determined upon a full investigation into their nature—an investigation which cannot be had at the time the receiver is appointed.*"

SIXTH.

The facts established by this record will not warrant the application of any well settled rule of equity for the displacement of a vested lien.

The only evidence introduced was the testimony of Mr. Hinchcliffe, auditor for the receiver, to prove that the items enumerated in the exhibit to the intervening petition were correct. (R. pp. 38-39.) There

is no controversy about this. Mr. Hinchcliffe said: "It is a correct statement of the account payable within the six months rule." But we hardly think a court would consider such a statement as evidence, for it is simply a conclusion of law, and Mr. Hinchcliffe was not sworn as an "expert on law." The most that can *properly* be deduced from it is that the items accrued within the six months, and were a charge against the company.

(a) **On the Theory of Diversion, no evidence was introduced to prove:**

Generally.

That the mortgage bondholders had obtained possession of that, "which in equity belonged to the whole or a part of the general creditors," or to appellee; nor

Specifically.

(1) Eor recovery out of the income of the receivership; that the income arising from the current earnings of the railway company was diverted from the payment of current expenses to the payment of the mortgage debt, principal or interest; nor

(2) For recovery out of the *corpus* of the mortgaged premises: That the net income arising from the operation of the property by the receiver, after

paying all necessary operating expenses, was diverted from the payment of the claims of general creditors to the betterment of the mortgaged property.

(b) On the theory of estoppel, no evidence was introduced to prove.

That the trustee of the mortgage bondholders failed, for an an unreasonable time after the default in the payment of interest, to move the Court to take possession of the mortgaged premises.

CONCLUSION.

We therefore submit that the decision of the Court of Appeals should be reversed and the intervening petition of the Terminal Railroad Association dismissed at its cost.

Respectfully submitted,

Bluford Wilson

P. B. Warren

Solicitors for Appellant.

No. 211.

Brief of Wheeler for Respondent

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CLERK

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Supreme Court of the United States.

OCTOBER TERM, 1897.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY, *Appellant*,

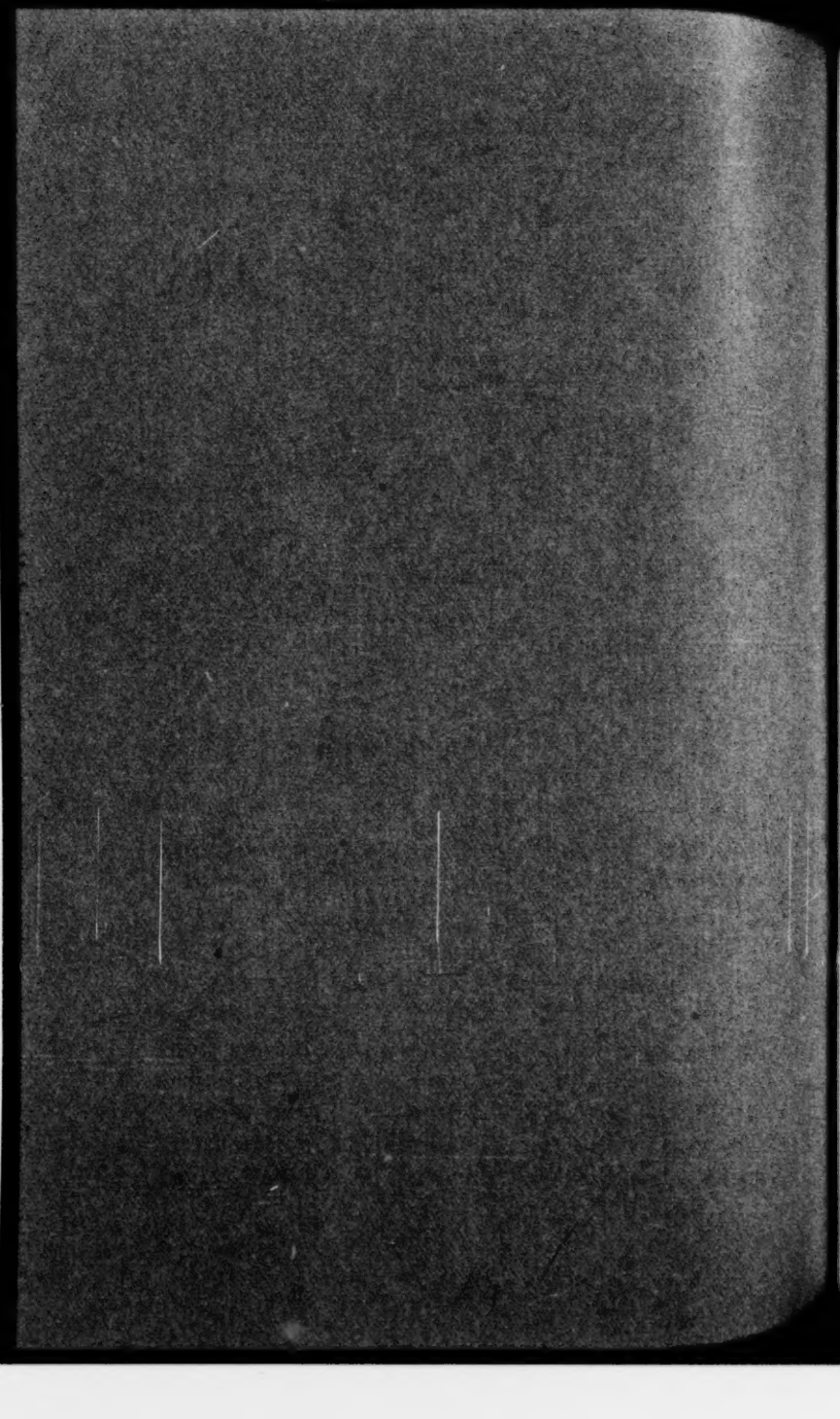
vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER, *Appellee*.

BRIEF AND ARGUMENT OF APPELLEE IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI.

M. F. WATTS,
SAMUEL P. WHEELER,
Attorneys for Appellee.

A. S. PLEASANTS PRINTING CO. ST. LOUIS



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TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER, *Appellee*.

BRIEF AND ARGUMENT OF APPELLEE IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI.

The application for writ of certiorari is based upon the claim that the decision of the Circuit Court of Appeals in this cause is at variance with the decisions of the Circuit Court of Appeals of the Fourth and Sixth Circuits, and with the decisions of this court.

The precise question adjudicated by the Court of Appeals of the Seventh Circuit can be best determined

by an examination of the statement of the case made by that court and its decision thereon, which are as follows:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SEVENTH CIRCUIT.

No. 367.—October Term, 1896, May Session, 1897.

C. H. Bosworth, Receiver of the Chicago, Peoria and St. Louis Railway Company,
Appellant,
vs.
Terminal Railroad Association of St. Louis,
Intervening Petitioner.

Appeal from the Circuit Court of the United States, for the Southern District of Illinois.

Before WOODS, JENKINS and SHOWALTER, Circuit Judges.

In a suit brought by the Mercantile Trust Company on the 21st day of September, A. D. 1893, to foreclose a mortgage upon the Chicago, Peoria and St. Louis Railway, the court appointed a receiver with the authority usually conferred upon receivers in the charge and operation of railways and in the general administration of the estate, and required the receiver to pay (1) all past due taxes, (2) all current operating expenses, (3) all past due wages, (4) "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket, trackage and traffic balances due from said railroad;" to this last item the Mercantile Trust Company objected, which objection the court overruled.

On the 27th day of May, 1895, the Terminal Railroad Association of St. Louis, the appellee, filed its intervening petition asserting a claim against the railway company amounting to $8,162.11 for switching, engine and car repairs, etc., done within six months prior to the date of the order appointing a receiver and asking for the allowance of the claim as a preferential claim under the order of the court appointing the receiver. An answer was filed to this petition by the receiver asserting that the facts stated might be true for anything known to the contrary, but, being stranger to the matters, he demanded strict proof, and denying that the petitioner was entitled to the relief demanded. The intervening petition under a general order of reference went to the master, whose report was to the effect that the claim was a just one and that the amount is a lien upon the property of the railway company prior and superior to the claims of the mortgage bondholders under the order appointing the receiver, and that it should be paid out of the surplus income or from a sale of the property of the railway company. To this report the receiver filed exceptions, not impugning the finding of the master that the claim was a just one against the company, but to the finding that the claim should be paid from the surplus income or from a sale of the property of the railway company, "whereas," the exception proceeds, "the said master should have found that the aforesaid amount is due the said petitioner but is not a lien upon the property of the railway company prior or superior to the lien of the mortgage bondholders." Upon hearing the court, on July 30, 1896, overruled the exceptions and entered a decree allowing the claim at the amount stated; and declaring that it was a claim of the character embraced in the order appointing the receiver to be paid as a preferred claim and directing that the receiver pay to the intervener the amount of the claim "out of the

income of said receivership, if any such income is in his hands, and in case he has not the funds in hand for this purpose it is ordered, adjudged and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and until paid the same is hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein." To this decree the receiver assigned error in substance to the effect that the court erred in adjudging that the claim of the intervening petitioner was entitled to priority to the mortgage debt. The receiver thereupon prayed an appeal which was allowed.

JENKINS, Circuit Judge, delivered the opinion of the court:

The contention of the receiver is thus stated in the brief of his counsel: "The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled on its petition and proof made thereunder to have the vested lien of the mortgagee displaced to the extent of his claim." He insists that the provision in the decree appointing a receiver providing for the payment of certain claims as preferential created no vested right, and that within our ruling in *Mather Humane Stock Transportation Company vs. Anderson*, 46 U. S. App. 138, the decree in that regard was interlocutory and is not controlling of the subsequent action of the court; and that within the doctrine declared in *Turner vs. The Indianapolis, Bloomington and Western Railway Company*, 8 Bis-

sell, 315; *Fosdick vs. Schall*, 99 U. S. 235; *Union Trust Company vs. Souther*, 107 U. S. 591; *Burnham vs. Bowen*, 111 U. S. 776; *Union Trust Company vs. Illinois Midland Railway Company*, 117 U. S. 432; *Wood vs. Guarantee Trust and Safe Deposit Company*, 128 U. S. 416; *Kneeland vs. American Loan and Trust Company*, 138 U. S. 89; *Thomas vs. Western Car Company*, 149 U. S. 111; *Farmers' Loan and Trust Company vs. Green Bay, W. & St. P. Railway Company*, 45 F. R. 664, before a claim can be deemed to be preferential to the mortgage debt, there must be first established a diversion of income from the payment of operating expenses to the payment of interest and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming at the request of a trustee the operation of a railway, has not the right to provide for the payment, out of the income or the corpus of the road, of operating expenses incurred within a limited time prior to the suit, unless there has been diversion of income and then only to the extent of such diversion.

It is, however, objected by the appellee that with this question the receiver is not concerned and that, the justice of the debt being conceded, it is none of his affair that it is preferred by the decree to the mortgage debt. This contention, we think, must be sustained. While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all parties in interest. His duty is to defend the estate against all claims which he deems to be unjust; his duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled; he represents the estate, with right to sue to recover demands due to it; with right to defend it

against claims asserted. In this respect we concur with the Circuit Court of Appeals for the Fourth Circuit that this duty carries with it the right and the duty, in case of doubtful claim, to take the judgment of the court of last resort. *Thom. vs. Pittard*, 8 U. S. App. 597. This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend against a claim asserted. In respect to many matters, the receiver has no right to appeal, while in respect to others, his right of appeal may not be gainsaid. Thus, he may rightfully appeal from a decree refusing him compensation, or disallowing his accounts, or establishing a claim against the estate, or denying a claim asserted for the estate. He has no right to appeal from a decree removing him from his position, for that is matter of discretion with the court appointing him, and he holds his position by the sufferance of the court; nor has he the right of appeal from a decree authorizing an issue of receivers' certificates, or directing a particular management of the trust property, or directing sale of the mortgaged property or confirming its sale, or directing the turning over of property in his hands; for he is neither the censor of the court nor interested in the event. Illustrations might be multiplied. The true line of demarcation, we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate; he has the right of appeal from any decree which affects his personal right, for therein he has an interest; but he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another. *Security Trust Company vs. Sullivan*, 45 U. S. App. 601, 603.

The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from the railway had been sold under decree of sale and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand moneys with which to pay the debt adjudged. That this debt was a just claim against the estate is not doubted and is conceded. No objection is taken to its allowance, nor is it questioned that under the decree appointing the receiver it was a proper claim to be paid in preference to the mortgage; but the receiver asserts that the decree allowing preferential claims was improvident, and that the mortgage had preference in payment, because there had been in fact no diversion of income to the payment of interest. Neither the trustee, nor the bondholders, nor the purchaser is here objecting. Who made the receiver the guardian of their interests in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to a common fund; and this, whether the estate remains in his custody or has passed from his possession and control under decree and sale? By what right does he become the partisan advocate when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what authority may he assert the rights of a purchaser? By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it? He has no such right. He is in so doing an interloper obtruding himself in breach of his duty where he has no right and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the

interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has no right to interfere.

It was held in *Farlow vs. Kelley*, 131 U. S. Appendix, cci, that the allowance by a circuit court of an appeal taken by a receiver is equivalent to leave by the court to the receiver to take an appeal, and it is urged that since the appeal here was allowed by the Circuit Court according to usual practice, we are bound to entertain it and to determine the question which the receiver has presented. In some States it is held that no case may be appealed by a receiver without permission, notwithstanding parties may appeal as of right and without leave. The Supreme Court, in the case referred to, merely holds that if leave were essential it was granted by the usual allowance of an appeal; but it is nowhere held, and the doctrine cannot be sanctioned, that the allowance of an appeal can operate to clothe the receiver with an interest which he has not, or can impose upon an appelate court the duty of hearing and determining a moot question.

The appeal will be dismissed.

It clearly appears, from the examination of the opinion, that the Court of Appeals passed upon but one question. When appointing appellant receiver of the insolvent railway company the court made the usual order directing the payment of claims for labor and materials accruing within the six months next prior to the appointment of the receiver, thus giving preference to such claims over the lien of the mortgage debt. It was conceded that the appellee's claim was just and came within the terms of the order of the court. The claim was allowed by the master in chancery, exceptions to his findings overruled, and

an order entered by the Circuit Court directing the receiver to pay the claim. The receiver alone resisted the payment; none of the bondholders or other creditors objected. The receiver appealed to the Court of Appeals, and in that court appellee insisted that the receiver had no appealable interest in the controversy. The Court of Appeals sustained this contention. This was the one point decided by the Court of Appeals, and in passing upon this point the Court of Appeals said: "That this debt was a just claim against the estate is not doubted and is conceded. No objection is taken to its allowance, nor is it questioned that under the decree appointing the receiver it was a proper claim to be paid in preference to the mortgage, but the receiver asserts that the decree allowing preferential claims was improvident and that the mortgage had preference in payment because there had been, in fact, no diversion of income to the payment of interest. Neither the trustee, nor the bondholders, nor the purchaser is here objecting. Who made the receiver the guardian of their interest in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to a common fund; and this, whether the estate remains in his custody or has passed from his possession and control under the decree of sale? By what right does he become the partisan advocate when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it? He has

no such right. He is in so doing an interloper obtruding himself in breach of his duty where he has no right and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to the receiver and his counsel to swell the cost of administration by assuming litigation with which he has no right to interfere."

Appellant will search in vain for a decision of any court, State or Federal, which is at variance with this ruling.

The case of *Thom vs. Pittard*, *supra*, was cited, commented upon, and the principle of law therein enunciated fully assented to in the opinion of the Court of Appeals in this cause. The principle laid down in *Felton vs. Ackerman* is in entire harmony with the opinion of the Court of Appeals in this cause and with the opinion in *Thom vs. Pittard;* that principle is elementary and is well stated by the Court of Appeals in its opinion in this cause, as follows: "While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all parties in interest. His duty is to defend the estate against all claims which he deems to be unjust; his duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled; he represents the estate with right to sue to recover demands due to it; with right to defend it against claims asserted." The court continues: "He has no right to appeal from a

decree removing him from his position, for that is matter of discretion with the court appointing him, and he holds his position by the sufferance of the court; nor has he the right of appeal from a decree authorizing the issue of receivers' certificates, or directing a particular management of the trust property, or directing a sale of the mortgaged property or confirming its sale, or directing the turning over of property in his hands; for he is neither the censor of the court nor interested in the event. Illustrations might be multiplied. The true line of demarcation we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate; he has the right of appeal from any decree that affects his personal right, for therein he has an interest; but he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent and not a partisan. His duty is to all parties in common, he should not become the advocate of one against another. *Security Trust Company vs. Sullivan*, 45 U. S. App. 601, 603."

In his petition for the writ of certiorari in this case (p. 8), appellant says: "The meritorious question presented to said Court of Appeals, by said appeal, was as to the right to displace vested contract liens in favor of unsecured creditors in railroad foreclosures where there had been no diversion of income." The question thus stated by the appellant himself is manifestly one in which he has no concern; having no concern in this question at any stage of this cause, in the Circuit Court where the suit originated, or in the Cir-

cuit Court of Appeals to which the appeal was taken, he has no interest in the determination of this question by this court.

The decree of the Circuit Court, from which the receiver appealed to the Court of Appeals for the Seventh Circuit, was an order directing the receiver, as an officer of the court, to pay a certain amount of money out of the funds that were or might come into his hands as such officer. The receiver admitted that appellee's claim was justly due, but resisted its payment upon the one ground that such payment would "displace the vested contract lien of the mortgage bondholders." As such officer of the court, in physical possession of funds entrusted to him by that court, what interest has he in a controversy between rival claimants to a portion of that fund? As such officer of the court, how does it become any part of his duty to protect complainant in a foreclosure proceeding against the operation of the decree of the court? The decree did not in any manner or to any extent impair the fund of which the receiver was custodian. The decree was, in fact, nothing more or less than an order of distribution, and as between distributees created a preference in favor of one as against the other. What interest had the receiver in this preference? This preference was created in the first instance in the order appointing the receiver. Could the receiver, taking possession under that order, clothed with whatever power he may possess by virtue thereof, have objected to this provision of the order? If he had no right to object to this provision of the order, what right has he to object when instructed to act in pursuance of such order? In taking

his appeal from the Circuit Court the basis of the appeal was that the original order was improvident; that in making such order the court could not displace the vested contract right of the bondholder, and that, although the bondholder himself did not object, the receiver would object for him. In asking for the writ of certiorari in this cause, the receiver becomes, not only the censor of the court of which he was an officer, but a censor of the Circuit Court of Appeals for the Seventh Circuit, to which he asks the writ of certiorari in this cause to be directed.

It concerns him not that the order of the court appointing the receiver gave preference to appellee's claim over the debt of the bondholder. He has no right to "take sides" with the bondholder or with appellee. It was his duty to know that the claim was just and fair, and that it came within the purview of the order of the court. In putting appellee to the proof of these facts, he but did his duty; here his duty, so far as any objection to the payment of appellee's claim is concerned, ended. He forgets and disregards that duty when he attacks the propriety of the order of the court creating the preference, and when he asks that the cause may be transferred to this court for its determination of the propriety of that order. The Circuit Court, in taking possession of the property, at the request of the bondholders, saw fit to direct that claims for labor and supplies incurred within six months prior to the appointment should be paid. The only parties interested in this order are the parties who would eventually become entitled to the surplus income and proceeds of the sale of the property. None of these parties are

here objecting. The objections the receiver makes to the payment of appellee's claim go not to the justness of the claim, but to the propriety of the order made by the court in the first instance.

The receiver forgets that when the court took possession of the property of the insolvent railway company, it was for the purpose of doing that which the railway company could not or would not do, namely: paying the creditors of the railway company, unsecured as well as secured, in the order in which equity might determine the priorities. Nor does he now seem able to comprehend the fact that the question of *preference or priority as between creditors is one which concerns the creditors only.* The debt of the insolvent railway company to appellee, for material furnished and labor performed, within the period fixed by the court giving priority to such claims when properly presented and allowed, and conceded to be just, became a claim against the *estate of the insolvent railway company in the receiver's hands.* It matters not at whose instance, or what may be the nature or character of the legal procedure, whenever the estate of an insolvent comes in *custodia legis*, the party appointed by the Court of Chancery to take possession for that court, holds "for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principle it would if no change of possession had taken place." *Fosdick vs. Schall*, 99 U. S. 235. It is, however, apparent that in construing this citation the receiver has inadvertently substituted the word "receiver" for the word "court"; for he seeks to make it

his duty to determine the rights of the parties, and having done this to direct the court to make the distribution in accordance with *his* findings.

The receiver apparently finds some difficulty in understanding the fact that the payment of a just debt allowed against the estate is not a diminution of the estate. The moment appellee's claim was allowed and conceded to be just, the appellee became, so far as the receiver is concerned, an absolute creditor of the estate, as much a creditor as the bondholder; and the payment of appellee's claim would be no more a diminution of the estate than would be the payment of the bondholder's claim—the question of priority between the two concerns these two alone. The difference between the *diminution of the estate*—loss by fire, accident, theft, or taking of part of the assets by some one not a just creditor—and the *distribution of the assets of the estate*, the receiver wholly fails to grasp. From his standpoint every payment he makes out of the assets of the estate—the payment of his own salary, the payment of the fees of his counsel, the payment for supplies used by him in the operation of the property —is a diminution of the assets of the estate, and should be strenuously opposed, and he would be doing only his duty in "carrying that resistance to the court of last resort."

The receiver admits that there is no defense to the claim as against the railway company, but resists its payment solely on the ground that such payment would displace the vested contract lien of the bondholders. And yet, he resents the charge that he has "become the partisan advocate, when his duty de-

mands of him impartiality and indifference with respect to the division of this common fund." (Opinion, *supra.*) It is difficult to conceive in what way he could make himself more distinctly, confessedly and avowedly the unsolicited champion of the interests of the uncomplaining mortgagee or purchaser under the foreclosure proceedings, nor how he could show a greater disregard of his duty to remain impartial as between the creditors contesting the right of priority.

Great stress is placed on the case of *McLeod vs. City of New Albany*, 66 Fed. Rep. 378. The decision in that case is in entire harmony with the decision rendered in this cause, and is within the unbroken line of decisions defining the receiver's duty. In the quotation given by the receiver from the *McLeod* case occurs this passage: "It was their duty to preserve the estate and to pay the taxes thereon. *If the taxes were illegally laid*, it was their duty, representing all the interests, to contest the payment." In that case, as in this, it was the duty of the receiver to see that the claim was *just.* The justness of the claim being conceded, the receiver's duty ended so far as resistance of payment of the claim was concerned. And so in every case cited by the receiver in support of his right to take the appeal, such right has been conceded only where the determination of the question involved might work a diminution or increase of the estate as a whole. The same is true of the citations from the text writers, *High* and *Beach.* For instance, in the citation from *High*, that author says, the receiver "has the same right to appeal from an adverse judgment for the recovery of funds pertaining to his receivership

as the party over whom he was appointed would have." And in the citation from *Beach*, it is said: "The receiver, as a party defendant to the action, has the same right to appeal from a judgment of the court affecting the interests of the estate represented by him that the *party or corporation to whom the estate originally belonged would have had* if the suit had been brought against them." In other words, these text writers hold this and only this, that the receiver can make for the party, whose property has been placed in his hands, the same defense the party himself could make. This principle has never been questioned, but it being admitted in this case that the railway company could make no defense to appellee's claim, it follows of necessity the receiver can make no defense. The failure on the part of the receiver to comprehend the difference between *diminution of the estate* and *distribution of the assets of the estate* is well illustrated by the closing sentence on page 38 of his brief and argument, where he says it is the duty of the receiver "to resist the diminishing of the estate by the payment to a general creditor in priority over all other creditors." We beg to ask how the creation of a preference or priority as between creditors can work a diminishing of the estate? And what possible interest has the receiver in the creation of such preference or priority?

The opinion of the Court of Appeals in this case announces no new or startling doctrine, though it defines clearly and concisely the relation of the receiver to creditors, and justly rebukes the conduct of the receiver in making himself the partisan champion of the interests of one creditor as against another. It is

the receiver who has attempted an innovation in practice, which the Court of Appeals saw fit to rebuke.

Appellee's claim matured four years ago, and on every principle of equity its payment should not longer be delayed—especially when payment has never been resisted by any party in interest. We respectfully ask that the receiver be permitted to thwart no longer the ends of justice, and that his petition for a writ of certiorari be denied.

W. F. Watts
Samuel P. Wheeler
Attorneys for Appellee.

Supreme Court of the United States

October Term, 1898.

No. 211.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA & ST. LOUIS RAILWAY,

Appellant,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, INTERVENING PETITIONER,

Appellee.

Brief and Argument for Appellee.

STATEMENT.

We think it important, at the very outset, to call the attention of this court to an error in the caption of this cause which appears in the record and the briefs of both parties filed in this court, as well as in the record and briefs filed in the court below. We do this because the caption as given in the record and briefs is misleading. This court would naturally infer from the caption that this is a separate and independent action against the receiver. Such is not the case. On page 22 of the printed Transcript of Record will be found a

copy of the intervening petition, in which the correct caption is given; the record thus discloses the fact to be —a fact which, from our standpoint, cannot be too strongly emphasized—that the matters in issue now before the court arise out of an intervening petition, filed in a suit brought by the trustee in a railway mortgage against the mortgageor to foreclose the mortgage; in the foreclosure proceedings the court, when appointing the receiver, directed him to pay claims of a certain character accruing within a certain time; the appellee in this cause having a claim against the railway company which fell within the class of claims thus preferred by the order of the court, appeared in the original cause and filed a brief, informal petition, setting forth its claims and praying that the same might be allowed and ordered to be paid, in pursuance of the general order of the court theretofore made directing the payment of claims of this character. Neither the trustee, the railway company, nor any party in interest, has at any time objected to the allowance or payment of the claim, and the receiver concedes that the claim is just and falls within the class of claims which, by the original order of the court above referred to, are given preference over the bonded debt; the receiver, however, objects to the allowance and payment of the claim on the sole ground that such allowance and payment "disturb the vested rights of the bondholders."

Having thus directed the attention of this court to what we conceive to be the main issue, we beg to adopt as a clear, concise and fair statement of the facts, upon which the controversy now before this court is based, the statement prepared by the United States Circuit

Court of Appeals, and embodied in the opinion rendered by it, which will be found on pages 35 and 36 of the Transcript of Record, and which is as follows:

> "In a suit brought by the Mercantile Trust Company on the 21st day of September A. D. 1893, to foreclose a mortgage upon the Chicago, Peoria and St. Louis Railway, the court appointed a receiver with the authority usually conferred upon receivers in the charge and operation of railways and in the general administration of the estate, and required the receiver to pay (1) all past due taxes, (2) all current operating expenses, (3) all past due wages, (4) 'all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past and all ticket, trackage and traffic balances due from said railroad;' to this last item the Mercantile Trust Company objected, which objection the court overruled.
>
> "On the 27th day of May, 1895, the Terminal Railroad Association of St. Louis, the appellee, filed its intervening petition asserting a claim against the railway company amounting to $8,162.11 for switching, engine and car repairs, etc., done within six months prior to the date of the order appointing a receiver, and asking for the allowance of the claim as a preferential claim under the order of the court appointing the receiver. An answer was filed to this petition by the receiver, asserting that the facts stated might be true for anything known to the contrary, but, being stranger to the matters, he demanded strict proof, and denying that the petitioner was entitled to the relief demanded. The intervening petition under a general order of reference went to the master, whose report was to the effect that the claim was a just one and that the amount is a lien upon the property of the railway company prior and superior to the claims of the mortgage bondholders under the order appointing the receiver, and that it should be paid out of the surplus income or from a sale of the property of the railway company. To this report the receiver filed exceptions not impugning the finding of the master that the claim was a just one against the company, but to the finding that the claim should be paid from the surplus income or from a sale of the property of the railway company, 'whereas,' the exception proceeds, 'the said master should have found that the aforesaid amount is due the said petitioner, but is not a lien upon the property of the railway company prior or superior to the lien of the

mortgage bondholders.' Upon hearing, the court, on July 30, 1896, overruled the exceptions and entered a decree allowing the claim at the amount stated; and declaring that it was a claim of the character embraced in the order appointing the receiver, to be paid as a preferred claim and directing that the receiver pay to the intervener the amount of the claim 'out of the income of said receivership, if any such income is in his hands, and in case he has not the funds in hand for this purpose, it is ordered, adjudged and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and until paid the same is hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein.' To this decree the receiver assigned error in substance to the effect that the court erred in adjudging that the claim of the intervening petitioner was entitled to priority to the mortgage debt. The receiver thereupon prayed an appeal, which was allowed."

BRIEF.

POINT I.

The appellant (the receiver) has no interest, substantial or otherwise, in this controversy, and hence has no appealable interest. When the order of the court, appointing a receiver, creates, in the first instance, preference or priority as between claimants or parties in interest, interested parties alone can except to such an order or appeal from the allowance of a claim made in conformity therewith. The receiver is not such party in interest.

Thompson on Corporations, Vol. 5, Secs. 6939 and 6941;

Herrick v. Miller, 123 Ind. 305;

Staunton v. Andrews, 18 Ill. App. 552;

2 A. and E. Corp. Cases (N. S.), p. 423, note;

Re Colvin, 3 Md. Ch. 278;

Chicago Title & Trust Co. v. Caldwell, 58 Ill. App. 219;

McLeod et al. v. City of New Albany, 66 F. R. 378;

Central Trust Co. of N. Y. v. Madden, 70 F. R. 451;

2 A. and E. Corp. Cases (N. S.), p. 528, note;

Strauss v. Carolina Interstate B. & L. Assn., 24 S. E. R. 116;

A. and E. Enc. of Law, Vol. 20, p. 13;

Beverly v. Brooke, 4 Gratt. 208;

People v. Security Life etc., Assn., 79 N. Y. 267;

Dorsey v. Sibert, 93 Ala. 312;

Ames v. Railway Co., 60 F. R. 966;

Fosdick v. Schall, 99 U. S. 235;

Security Trust Co. v. Sullivan, 45 U. S. App. 601–603.

POINT II.

In appointing a receiver of the property of an insolvent railway company, upon application of the holders of its mortgage bonds, the court has the right, in the exercise of a reasonable discretion, to direct the payment of claims incurred in the operation of the property in preference to the mortgage debt; the payment of such claims may be made a condition of the appointment of a receiver.

Turner v. Indianapolis, etc. R. R., 8 Bissell, 315;
Fosdick v. Schall, 99 U. S. 235;
Union Trust Co. v. Souther, 107 U. S. 591;
Burnham v. Bowen, 111 U. S. 776;
Farmers' Loan & Trust Co. v. Green Bay Ry. Co., 45 F. R. 664;
American Loan & Trust Co. v. Railroad Co., 46 F. R. 101;
Kneeland v. American Loan & Trust Co., 136 U. S. 89;
Central Trust Co. v. St. Louis, etc. R. R. Co., 41 F. R. 551;
Blair v. St. Louis, etc. Ry. Co., 22 F. R. 471;
Ames v. Union Pacific R. R. Co., 74 F. R. 335;
Wood v. Guarantee Trust & Safe Deposit Co., 128 U. S. 416;
Miltenberger v. Railroad Co., 106 U. S. 286;
Farmers' Loan & Trust Co. v. Railroad Co., 53 F. R. 182;
Poland v. Railroad Co., 52 Vt. 144.
Morgan's L. & T. R. & S. Co. v. Railroad, 137 U. S. 171;
Hale v. Frost, 99 U. S. 389;
Drennen v. Mercantile Trust & Deposit Co., 8 A. and E. Corp. Cases, Vol. 8 (N. S.), 60.

POINT III.

When the record is silent as to the facts on which the court entered the order preferring claims of a certain class, the Appellate Court will not say such order was improvidently entered.

Smith v. Fletcher, 11 S. W. R. 824;
Detro v. State, 4 Ind. 200;
Elliott's Appellate Procedure, Secs. 710 and 709

POINT IV.

An objection to the allowance of a claim in a receivership proceeding, not made before the Master in Chancery to whom the claim was referred, or in the trial court, upon exceptions to the report of the master allowing the claim, cannot be made in the Appellate Court.

BRIEF AND ARGUMENT.

POINT I.

The appellant (the receiver) has no interest, substantial or otherwise, in this controversy, and hence has no appealable interest. When the order of the court appointing a receiver creates, in the first instance, preference or priority as between claimants or parties in interest, interested parties alone can except to such an order or appeal from the allowance of a claim made in conformity therewith. The receiver is not such party in interest.

The opinion of the Court of Appeals is as follows:

> "The contention of the receiver is thus stated in the brief of his counsel: 'The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled on its petition and proof made thereunder to have the vested lien of the mortgage, displaced to the extent of his claim.' He insists that the provision in the decree appointing a receiver providing for the payment of certain claims as preferential created no vested right, and that within our ruling in *Mather Humane Stock Transportation Company vs. Anderson*, 46 U. S. App. 138, the decree in that regard was interlocutory and is not controlling of the subsequent action of the court; and that within the doctrine declared in *Turner vs. The Indianapolis, Bloomington and Western Railway Company*, 8 Bissell, 315; *Fosdick vs. Schall*, 99 U. S. 235; *Union Trust Company vs. Souther*, 107 U. S. 591; *Burnham vs. Bowen*, 111 U. S. 776; *Union Trust Company vs. Illinois Midland Railway Company*, 117 U. S. 432; *Wood vs. Guarantee Trust and Safe Deposit Company*, 128 U. S. 416; *Kneeland vs. American Loan and Trust Company*, 128 U. S. 89; *Thomas vs. Western Car Company*, 149 U. S. 111; *Farmers' Loan and Trust Company vs. Green*

Bay, W. & St. P. Railway Company, 45 F. R. 664, before a claim can be deemed to be preferential to the mortgage debt, there must be first established a diversion of income from the payment of operating expenses to the payment of interest and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming at the request of a trustee the operation of a railway, has not the right to provide for the payment, out of the income or the corpus of the road, of operating expenses incurred within a limited time prior to the suit, unless there has been diversion of income and then only to the extent of such diversion.

"It is, however, objected by the appellee that with this question the receiver is not concerned and that, the justice of the debt being conceded, it is none of his affair that it is preferred by the decree to the mortgage debt. This contention, we think, must be sustained. While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all parties in interest. His duty is to defend the estate against all claims which he deems to be unjust; his duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled; he represents the estate, with right to sue to recover demands due to it; with right to defend it against claims asserted. In this respect we concur with the Circuit Court of Appeals for the Fourth Circuit that this duty carries with it the right and the duty, in case of doubtful claim, to take the judgment of the court of last resort. *Thom vs. Pittard*, 8 U. S. App. 597. This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend against a claim asserted. In respect to many matters, the receiver has no right to appeal, while in respect to others, his right of appeal may not be gainsaid. Thus, he may rightfully appeal from a decree refusing him compensation, or disallowing his accounts, or establishing a claim against the estate, or denying a claim asserted for the estate. He has no right to appeal from a decree removing him from his position, for that is matter of discretion with the court appointing him, and he holds his position by the sufferance of the court; nor has he the right of appeal from a decree authorizing an issue of receivers' certificates, or directing a particular management of the trust property, or directing sale of the mortgaged property or confirming its sale, or di-

recting the turning over of property in his hands; for he is neither the censor of the court nor interested in the event. Illustrations might be multiplied. The true line of demarcation, we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate; he has the right of appeal from any decree which affects his personal right, for therein he has an interest; but he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another. *Security Trust Company vs. Sullivan*, 45 U. S. App. 601, 603.

"The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from the railway had been sold under decree of sale and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand moneys with which to pay the debt adjudged. That this debt was a just claim against the estate is not doubted and is conceded. No objection is taken to its allowance, nor is it questioned that under the decree appointing the receiver it was a proper claim to be paid in preference to the mortgage; but the receiver asserts that the decree allowing preferential claims was improvident, and that the mortgage had preference in payment, because there had been in fact no diversion of income to the payment of interest. Neither the trustee, nor the bondholders, nor the purchaser is here objecting. Who made the receiver the guardian of their interests in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to a common fund; and this, whether the estate remains in his custody or has passed from his possession and control under decree and sale? By what right does he become the partisan advocate when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what authority may he assert the rights of a purchaser? By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it? He has no such right. He is in so doing an interloper, obtruding himself in breach of his duty where he

has no right and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has no right to interfere.

"It was held in *Farlow vs. Kelley*, 131 U. S. Appendix, cci., that the allowance by a Circuit Court of an appeal taken by a receiver is equivalent to leave by the court to the receiver to take an appeal, and it is urged that since the appeal here was allowed by the Circuit Court according to usual practice, we are bound to entertain it and to determine the question which the receiver has presented. In some States it is held that no case may be appealed by a receiver without permission, notwithstanding parties may appeal as of right and without leave. The Supreme Court, in the case referred to, merely holds that if leave were essential it was granted by the usual allowance of an appeal; but it is nowhere held, and the doctrine cannot be sanctioned, that the allowance of an appeal can operate to clothe the receiver with an interest which he has not, or can impose upon an Appellate Conrt the duty of hearing and determining a moot question.

"The appeal will be dismissed."

The receiver has no interest, substantial or otherwise, in this controversy. To the order of the court creating a preference in favor of claims for supplies and labor, incurred within the six months preceding the appointment of the receiver, over the lien of the mortgage debt, the receiver did not and could not, at the time the order was entered, object, nor can he now object; he did not and could not question the propriety of that order; he did not and could not question the exercise of the discretion of the judge in making the order; and he cannot now attack as improvident the decree of the court entered in conformity with that order.

In his report on appellee's (intervener's) intervening petition, the Master in Chancery found that the

amount of the intervener's claim was a lien superior, under the order appointing the receiver, to the mortgage debt; in confirming this report and overruling the exceptions, the court found that the labor and material forming the basis of intervener's claim were performed and furnished within the six months preceding the appointment of the receiver, and were embraced in the order directing the receiver to pay such claims as preferred claims; and the receiver himself admits that the claim is just and comes clearly within the provisions of the order appointing the receiver and directing him to pay, as preferred, certain claims. It therefore follows, we claim, as a necessary, legal and logical sequence, that the decree directing the payment of this claim must stand, unless the order of the court in the first instance was improvidently made; and it also follows that the receiver cannot attack the decree from which he takes his appeal without assailing, also, the order made at the time he was appointed receiver. It is equally true, we insist, that, although it might be conceded, for the sake of the argument, that the order was improvidently made in the first instance, this objection can be urged only by parties in interest—and the receiver is not such a party—and, to avail the parties in interest, should have been insisted upon at the time the order was entered; and, when overruled, exception should have been entered or appeal taken.

We again call the attention of this court to the caption of this cause, as found on the title-page of the Transcript of Record, as well as on the title-page of the Brief and Argument of Appellant—an error which we have been forced to follow (but not adopt) to avoid

confusion. The caption would suggest that this is an appeal from a judgment rendered in an independent action by appellee against C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway; whereas—and the record so discloses—it is an appeal of the receiver from a decree of the court entered on an intervening petition in the cause of the Mercantile Trust Company against the Chicago, Peoria and St. Louis Railway Company *et al.* How the error arose it is immaterial now to inquire, and we call attention to the fact for the one reason that, from our standpoint, it emphasizes the graver error in which we contend the receiver has fallen, namely: insisting that this is a controversy between himself and the intervener.

The relation of appellant to the controversy and his interest therein are fully disclosed in his brief and argument in support of his petition for writ of certiorari filed in this court. His statement of the case, covering pages 1 to 7 of that brief and argument, is a fair presentation of so much of the record as is necessary to determine his relation to the controversy, and, taken in connection with his argument, furnishes the grounds upon which appellee contends that he has no appealable interest.

From his own statement it appears that the order appointing him receiver directed him to pay

> "all claims for material and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket, trackage and traffic balances due from said railroad."

Some time subsequent to the appointment of the receiver, appellee filed its intervening petition, alleging

that within the six months prior to the appointment of the receiver it performed certain labor and furnished certain material for and to the defendant railway company, and asked that its claim be allowed and directed to be paid under this order. This petition, under a general order of reference, went to the Master in Chancery, who, having heard evidence, reported that there was due the intervener the amount of its claim as set forth in the intervening petition, and found that the same was a lien on the property of the railway company prior and superior, under the order appointing the receiver, to the claim of the mortgage bondholders, and recommended that the same should be paid out of the surplus income or from a sale of the property. To this report the receiver alone filed exceptions, and his exceptions having been overruled, he alone appealed to the United States Circuit Court of Appeals, and from the finding of that court he alone appeals to this court.

On page 6 of the receiver's brief, filed in the Court of Appeals, in this cause, he says:

> "The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporatien, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled, on its petition and proof made thereunder, to have the vested lien of the mortgage displaced to the extent of its claim."

This language from the receiver's brief in the court below is cited in the opinion by that court, and will be found in the first paragraph of that opinion. (Transcript of Record, p. 47.) This frank statement by the

receiver of the issue, clearly presents the question of his appealable interest in this controversy. The complainant in the bill, the trustee for the bondholders, in the foreclosure proceeding, did not except to the report of the Master in Chancery allowing appellee's claim, nor did it except to the order of the court confirming that report and directing the payment of the claim out of funds in the hands of the receiver, or out of the proceeds of a sale of the mortgaged premises. No creditor has objected to the decree in appellee's favor, nor does the defendant company object. For aught that the record shows to the contrary, all parties who have or may have any possible interest in the controversy are willing that the claim should take precedence over the mortgage debt and be paid. The receiver alone objects. He admits that the claim is, in all respects, just, and that it falls within the order of the court directing him to pay claims accruing within six months prior to his appointment; the sole ground of his objection is that it "displaces the vested lien of the mortgagees."

The receiver wholly misconceives his position and his duty. The decree of the trial court from which he takes his appeal was entered without protest or objection upon the part of any one in interest, and is a simple order directing him, as an officer of the court, in control of funds coming into his possession under the order of that court, to pay out of such funds a claim which the court has passed upon and found to be correct. The receiver admits that the claim is justly due, but refuses to comply with the order of the court because, in his opinion, the payment of the claim will

"displace the vested contract lien of the mortgage bondholders." As an officer of the court, in physical possession of funds entrusted to him by that court, what interest has he in a controversy between rival claimants to a portion of that fund? As such officer of the court, does it become any part of his duty to protect complainant in the foreclosure proceeding against the operation and decree of the court, especially when the complainant is not seeking such protection? The decree does not, in any manner or to any extent, impair the fund of which the receiver is the custodian. The decree is, in fact and in effect, nothing more or less than an order of distribution; and, as between distributees, creates a preference in favor of one as against the other. What interest has the receiver in this preference? This preference was created, in the first instance, in the order appointing the receiver. Could the receiver, taking possession under that order, made by it an officer of the court, clothed by virtue thereof with whatever power he may possess, have objected to any provision of that order? Could he, upon qualifying as receiver, file his exception as such receiver to the order of the court making certain claims preferred? If he had, at the time of his appointment, no right to object to such provision of the order, what right has he now to object, when instructed to act in pursuance thereof? When the court appointed him, it said to him, in effect:

> "There are certain claims which the court decrees shall have priority over the mortgage debt; these claims you are to pay first."

The receiver accepts the appointment, takes possession of the property, and, when directed by the court to

pay a preferred claim which he concedes to be just, says:

> "Your order was improvident; I am of the opinion that you cannot displace the vested contract lien of the bondholder; the bondholder does not object, but I object for him."

We do not lose sight of the fact that at the time the order was entered, the record shows that counsel for the complainant objected to that portion of the order directing the receiver to pay claims of the class of which this is one; but the complainant who made the objection can alone secure the benefit of it, and that benefit it is not now, in its own name or in its own behalf, seeking to enforce. The record shows no motion for review or modification of, or appeal from the order; and, moreover, the provision that claims of a certain character should be preferred to the mortgage debt became one of the conditions upon which the receiver was appointed.

It may be true that counsel for the receiver in this cause was counsel for the complainant in the foreclosure proceeding. In the petition for rehearing filed in the court below, and printed in Transcript of Record, p. 39, *l. c.* 56, the attention of that court was called to the fact that the solicitors for the receiver also represented the complainant, the trustee, in the foreclosure proceeding. We do not now say that there is any inconsistency in the dual position thus held by the counsel for the receiver; although he admits

> "that the better practice forbids this, and requires that the trustees, at whose suit he is appointed, should have separate counsel. In some circuits, especially in cases of great importance, the courts either appoint separate counsel for the receiver, or require the latter so to do."

This "better practice" was adopted in answer, we may suggest, to the prayer of conscientious counsel for the trustee that he "be not led into temptation." But we do insist that the counsel for the receiver cannot, because they represented and now represent the complainant in the foreclosure proceeding, make a cat's-paw of their client, the receiver, for the benefit of another client, the complainant in the foreclosure proceeding. In fact, the petition for rehearing in the court below practically concedes that it is not the receiver who is interested in this controversy, but the complainant in the original cause, who is not a party to the appeal, and who did not except to the finding of the master or the decree of the trial court thereon. On page 38 of his brief in support of his petition for rehearing in the court below (Transcript of Record, p. 57), the receiver makes the remarkable request that this cause be remanded to the trial court,

> "with directions to permit either the complainant in the original cause, or any party who has succeeded to its rights, to be made a party to the intervening petition, and with the right of appeal from a decree of the Court thereon."

This prayer, we contend, is an admission that the receiver has no appealable interest. The receiver forgets that this controversy arose out of an intervening petition filed in the original cause, and hence the complainant in that original proceeding was a party so far as the intervening petition is concerned. This request of the receiver, addressed to the court below, is an open and bold declaration to the effect that in the prosecution of the appeal he represents the complainant in the original cause or its successor in interest—

that he has yielded to the temptation from which the "better practice" would have saved him.

What right has the receiver to take this attitude?

Mr. Thompson, in his recent work on corporations, Vol. 5, Sec. 6939, says:

> "If the receiver is appointed by a Court of Equity, he represents in a sense the Court, whose hand he is sometimes said to be."

Again:

> "The receiver being the mere officer of the Court, the control of the Court over him is *plenary*, at least in any controversy which may arise between him and the Court touching the propriety of any order of the Court made upon him. . . . He has no discretion, in general, *in the application of funds in his hands*, but holds them strictly subject to the order of the Court, and to be disposed of as the Court may direct. He cannot appeal from an allowance made by the Court in favor of the claimants against funds in his hands."—*Ibid, Sec. 6941.* (Italics are ours.)

The case of *Herrick v. Miller, 123 Ind. 305*, arose out of an action to foreclose a mortgage. During the pendency of the action a receiver was appointed, and, as such, became possessed of certain funds, which the Court directed him to pay over to the mortgagee. The receiver appealed from the order, and the mortgagee moved in the Supreme Court to dismiss the appeal. In passing upon this motion the Court says:

> "It is well established that courts have power over their own receivers to control them in the settlement of all demands against the property in their hands, and as officers of the Court it is their duty to obey the orders of the Court. . . . A receiver cannot contest an allowance made to one of the parties to a suit in which he was appointed by the Court from which he received his appointment. . . . When the Court acquires jurisdiction over the parties to the suit, all orders made as to the disposition of the funds

> in the hands of the receiver binds them until reversed, and is a complete protection to the receiver. To permit the receiver to question the correctness of such orders would be to permit the constant 'rebellion of the hands against the head,' which would result in the utmost confusion and would wholly destroy the usefulness of the office of receiver."

The appeal was dismissed.

The case of *Staunton v. Andrews, 18 Ill. App. 552*, reached the Appellate Court upon an appeal of the receiver from an order directing him to pay a claim which had been allowed against the funds in his hands. The receiver had been appointed in a creditors' suit. The Court says:

> "No one of the creditors or claimants is here to complain. The only person taking the appeal or assigning error is the receiver. . . . A receiver is an officer of the Court, and has been figuratively styled the hands of the Court. With that figure in mind, this case appears very much like a mild rebellion of the hands against the head."

This cause does not present the question whether or not the complainant in the foreclosure proceeding, or any creditor of the defendant railway company, or any one claiming an interest in the funds in the hands of the receiver, could have asked for a review or modification of the decree making appellee's claim preferred, had the proper steps been taken at the proper time. Our claim is simply that the receiver cannot ask for such review or modification; that the Court will not permit the receiver to be made a cat's-paw for the complainant in the foreclosure proceeding; that the receiver has no interest in the controversy; that, as between rival claimants, he must remain silent and inactive; that he has no right to take sides with either party. It was his duty to know that the claim was

just and fair, and that it came within the purview of the order of the Court making claims of a certain class preferred to the mortgage debt. In putting appellee to the proof of these facts he but did his duty; here his duty ended, so far as any resistance to the allowance or payment of the claim is concerned. He wholly forgets that duty and goes beyond it when he attacks the propriety of the order of the Court determining the general principle of preference as between claims of creditors. The Court, in the exercise of its discretion, saw fit, in taking possession of the property of the railway company and appointing a receiver at the instance of the bondholders to make, as a condition of such appointment, that claims for labor and supplies incurred within six months prior to the appointment of the receiver should have preference over the mortgage debt. The only parties interested in this order are the parties who would eventually become entitled to the surplus income and proceeds of a sale of the property. None of these parties are here objecting. So far as the record shows, they are wholly satisfied with the order. The record shows no effort upon the part of the complainant in the foreclosure suit to insist upon the objection made by it when the order was entered.

We do not controvert the doctrine that the receiver has the right to appeal from a judgment rendered against him arising out of a matter connected with his operation of the trust estate. This is not a judgment against the receiver rendered in an action brought against him. No act of his is called in question. The decree appealed from in this cause is on an intervening petition, and simply declares that a claim, which the

receiver admits to be just and to fall clearly within the provisions of the order directing certain claims to be paid, shall be paid in accordance with the provisions of that order, and shall have preference over the lien of the mortgage debt. The objection that the receiver makes to the payment of the claim goes, not to the justness of the claim, but to the propriety of the order made by the Court in the first instance, giving the claim preference over the mortgage debt.

> "A receiver cannot intermeddle in questions affecting the rights of parties in the disposition of property in his hands." *2 A. and E. Corp. Cases (N. S.), p. 423, note.*

The receiver, as such, has absolutely no interest whatever in this controversy; his one duty is to obey the instructions of the trial court; the decree of that court fully protected him, and to it no interested party objected, and from it no interested party appealed.

> "As well might it be said that the register of this Court, when ordered to draw a check for money paid into Court to the credit of the cause, could stay the execution of the order by appealing and giving bond."
>
> *Re Colvin, 3 Md. Ch. 278.*

The case of *Chicago Title & Trust Company v. Caldwell, 58 Ill. App. 219*, contains a vigorous declaration of the principle for which we contend. In that case the Court ordered that a certain claim

> "be allowed against the estate (in the hands of the receiver) to be paid *pro rata* with the claims of general creditors."

From this order the receiver appealed. Mr. Justice Gary, in delivering the opinion of the Court, says:

> "Very vague and confused notions seem to prevail in this county—we have not observed that they have spread over

the State—as to the powers of receivers. A receiver is the mere hand of the Court to do what the Court directs. When in passing upon his accounts, the Court charges or refuses to allow items, and he claims that the action of the Court does him wrong personally, he may appeal," citing *Hinckley v. Gillman, etc. R. R., 94 U. S. 467; How v. Jones, 60 Iowa, 70.*

The Court continues:

"But if he may appeal from one order in which he has no interest, as to the distribution of assets, he may from every one; and unless he can be charged with bad faith or want of reasonable prudence, his expenses and reasonable compensation must come out of the assets. No precedent for such an appeal has come to our knowledge, except a series of cases in *28 N. Y. Sup.*, where, under the peculiar system of New York, it was held that a receiver having a right to apply to the Court for instructions was entitled to instruction by the entire Court, and, therefore, might appeal from special to general term. *People v. St. Nicholas Bank, 28 N. Y. Sup. 407.* But even the vigorous protest of Van Brunt, P. J., would seem unanswerable if the appeal were to another court. This point has not been made by counsel for appellee, *but we cannot sanction, even by silence, the idea that a receiver may set up in opposition to the Court his theories of how the assets shall be disposed of. Next we will have clerks appealing from the direction of the Courts to enter orders unwise in the opinion of the clerks. The appeal is dismissed at the cost of the appellant, to be paid by it without any charge against the estate for costs or other expenses.*" (Italics are ours.)

The appeal in this cause is not only an appeal from an order of distribution, but is an attempt to attack as improvident that portion of the decree of the Court under which the receiver was appointed, preferring and directing him to pay all claims of a certain class within which appellee's claim falls. The Court, hearing the application of the complainant in the foreclosure proceeding for the appointment of a receiver, granted its application, but in so doing saw fit to direct that certain claims should take precedence over the lien of the

mortgage debt. There is nothing in the decree requiring proof of diversion before such a preference can become fixed or established. So far as the receiver is concerned, the order creating the preference is absolute, and his only duty thereunder was to see that appellee's claim was correct and fell within the provisions thereof, and this he admits. By his appeal he seeks to have modified the order under which he was appointed, and in respect to a feature of the order with which he has absolutely no concern. All of the parties having any interest in this order were in court when the intervening petition was filed, when the master's report was made, when exceptions to that report were filed, and when such exceptions were overruled and the decree of the trial court entered thereon. They were not only in court, but were parties to the intervening petition.

In the case of *McLeod et al. v. City of New Albany, 66 F. R. 378*, it is said:

> "The parties to an original bill are, in fact, parties to an intervening petition filed in the suit, and bound to take notice of such petition and the proceeding thereunder, though not made formal parties to the petition."

We fail to find a single case in which the question of preference or priority of one class of creditors over others has been raised, that has been taken to an Appellate Court on the appeal of the receiver, and in which the receiver's appeal has not been dismissed.

In the case of *Central Trust Company v. Madden, 70 F. R. 451*, one of the complainants in a consolidated cause appealed from the decree of the Court making a judgment against the defendant company a lien prior to complainant's mortgage. The Court says:

> "It is objected by appellant that the Central Trust Company should have been a party to the intervention; but that

company was complainant in one of the suits, and bound to take notice of the intervention and proceedings thereunder."

Again:

"When property is in the custody of the Court for distribution, under a receivership, *it is the duty of the persons claiming to be interested in it or its earninys, or in the proceeds of its sale, to come into that Court and set up their rights.*" *2 A. and E. Corp. Cases (N. S.), p. 528.* (Italics are ours.)

In his brief in the Court of Appeals, appellant insisted that in the absence of any proof of diversion—that is, application by the railway company of its current income to the payment of interest on the mortgage debt—the claim of a creditor who furnished material or performed labor within six months prior to the appointment of the receiver could not take precedence over the lien of the mortgage debt. To this we answer: First, that the receiver cannot raise this question at any time, in any manner, at any stage of the proceedings; Second, that the question of priority of the claim of the material man or laborer over the lien of the mortgage debt is one that concerns the claimant and the bondholder alone, and one in which the receiver has no right to intermeddle; Third, this question was settled by the decree of the Court which created the preference in favor of the claimant in the first instance, and this decree is binding on all parties until modified at the instance of the bondholder, and the bondholder, having failed to appeal from the decree, cannot now question the propriety of the order: Fourth, under any circumstances, it would be incumbent upon a party in interest, attacking the order of the Court creating the preference in favor of the ma-

terial man or laborer over the bondholder upon the ground that there was no proof of diversion, to plead this defense; and Fifth, if the receiver defends on the ground that the order of the Court was improvident because there was no diversion, it was certainly his duty to so plead in resisting the claim, and offer evidence in support of the plea; it could not have been incumbent on the claimant to show that the order was not improvident.

We have been unable to find a single authority which sustains the right of a receiver to appeal from an order of the Court determining questions of priority or preference as between creditors of an insolvent company.

In the case of *Strauss v. Carolina Interstate B. and L. Ass'n, 24 S. E. R. 116*, a receiver had joined with certain stockholders in an appeal from a decree of the Court prescribing the method in which the receiver should adjust the claims of the different classes of stockholders (creditors). In passing on the appeal the Court says:

> "We call attention to the fact that the receivers are appellants now and at the last term, when it does not appear that any question is presented in which the corporation is interested; there are cases in which it is the duty of the receivers to appeal where they think the party or corporation they represent has not had justice, but it is not considered to be their duty to appeal in the interest of one portion of the stockholders against the other. And as to their duties, it is expected they will observe the direction of the Court from whom they received their appointment. If any of the parties interested as corporators think the judge's instructions are erroneous and injurious to them, they may appeal."

The receiver insists that he represents all of the parties to the foreclosure proceeding. This is true, undoubtedly, so far as preservation and management of the trust estate placed in his hands by order of the Court is concerned; but it is not true that, as between parties whose interests may conflict, he may represent the interests of one as against the other. While his counsel may be also the counsel for the complainant in the bill of foreclosure, it is not his duty to fight his counsel's battles when representing the trustees or bondholders. Conceding for a moment the correctness of the receiver's contention—that he represents all the parties in interest—then it must follow that he represented the intervener as well as the complainant in the bill of foreclosure, and the defendant; and, therefore, if the finding of the Master or of the trial Court had been adverse to the intervener, it would have been the duty of the receiver to appeal. But the receiver does not represent in any sense any one of the parties to the suit, except in so far as it is his duty to manage the property to the best of his ability and in pursuance of the orders of the Court.

> "As an officer of the Court, the receiver is subject to its direction and control; and he is not the representative of either or any of the parties to the litigation, but acts for the benefit of all concerned in the controversy." *A. and E. Enc. of Law, Vol. 20, p. 13.*

In *Beverly v. Brooke, 4 Gratt. 208*, it is said:

> "It is of no consequence to him [the receiver] how, or when, or to whom the Court may dispose of the funds in his hands, provided the order or decree of the Court furnishes to him a sufficient protection."

In *People v. Security Life, etc. Assn., 79 N. Y. 267*, the Court says:

> "He [the receiver] is not to advocate the cause of one claimant as against another; between them he is indifferent, owing a like duty to all, and for that very reason should, as far as possible, see to it that each has an equal opportunity to enforce his claim."

In *Dorsey v. Sibert, 93 Ala. 312*, it was held:

> "An appeal by a receiver from an order allowing claims on the funds in his hands will be dismissed."

In *Ames v. Railway Co., 60 F. R. 966* (*l. c. 969*), it is well said:

> "It is well settled that the receivers of an insolvent railroad corporation, appointed by a Court of Chancery, to preserve its property and operate its railroad, do not stand in the shoes of the corporation. They are neither the representatives of the insolvent corporation nor of its creditors or stockholders; they are the officers and representatives of the Court—the hands of the Court."

In *Fosdick v. Schall, 99 U. S. 235* (*l. c. 251*), Chief Justice Waite thus concisely defined the relation of the receiver to the parties in interest:

> "He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the Court proceeds to determine the rights of the parties upon the same principle it would if no change of possession had taken place."

In this case the trial Court "*determined the rights of the parties*," that is, the right of the intervener seeking to have its claim for material furnished to and labor performed for the insolvent railway company paid out of proceeds of sale of the mortgaged premises before the holders of bonds secured by a mortgage upon the property should have their claim paid. As between

these claimants the trial Court found in favor of the intervener, and then directed the receiver, its officer, to pay the intervener's claim. In response to this direction, the receiver not only refuses to obey the order, but assails the discretion of the Court and attacks its order as improvident—this, too, in spite of the fact that neither the bondholder nor the railway company makes any objection. The words above quoted from *Fosdick v. Schall* are quoted by the receiver in his petition for rehearing (p. 41, Transcript of Record). It is, however, apparent, that in construing this citation the receiver has substituted the word "receiver" for the word "court;" for he seeks to make it *his* duty to determine the rights of the parties, and having done this, to direct the Court to make the distribution in accordance with his findings. Is it, therefore, surprising that the Court of Appeals, in dismissing the receiver's appeal, should administer a rebuke in the following vigorous language:

> "That this debt was a just claim against the estate is not doubted and is conceded. No objection is taken to its allowance, nor is it questioned that under the decree appointing the receiver it was a proper claim to be paid in preference to the mortgage; but the receiver asserts that the decree allowing preferential claims was improvident and that the mortgage had preference in payment because there had been in fact no diversion of income to the payment of interest. Neither the trustee, nor the bondholders, nor the purchaser is here objecting. Who made the receiver the guardian of their interests in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to the common fund; and this, whether the estate remains in his custody or has passed from his possession or control under decree and sale? By what right does he become the partisan advocate, when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what authority may he assert the right of the purchaser? By what

> right does he undertake to prevent the enforcement of this claim against the purchased estate presumably by the decree of sale charged as a lien upon it? He has no such right; he is, in so doing, an interloper obtruding himself, in breach of his duty, where he has no right, and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to the receiver and his counsel to swell the costs of administration by assuming litigation with which he has no right to interfere." (Pages 37 and 38, Transcript of Record.)

In his petition for rehearing filed in the Court of Appeals (Transcript of Record, p. 40), the receiver, commenting upon that part of the opinion of that Court referring to the admission made by the receiver that the intervener's claim was just, says:

> "The Court has correctly stated the contention of the receiver, but we submit it has drawn from the language used by his counsel an erroneous conclusion, viz.: 'That this debt was a just claim against the estate is not doubted.' The distinction between the concession made by the receiver and the conclusion drawn by the Court is vital, in the determination of the receiver's right to appeal. The receiver admits the claim to be just as against the *railway company*, but *expressly denies* it to be just as *against the estate* in his hands for conservation."

We confess our inability to comprehend the distinction the receiver seeks to make. Conceding the mortgage debt to be a valid claim against the railway company; conceding, as the receiver does, intervener's claim to be also a valid claim against the railway company, the only question that can possibly arise is, which claim shall take preference in order of payment out of the property of the railway company or the proceeds of a sale of such property in the hands of the receiver. This being, then, the question, and the only

question in the case, and one the determination of which affects only the bondholders and the intervener, and possibly other creditors, how is it possible that the determination of this question can affect or touch in any manner the duties of the receiver as the conservator of the estate? When the court took possession of the property of the insolvent railway company, it was for the purpose of doing that which the railway company could not or would not do, namely, paying the creditors of the railway company, unsecured as well as secured, in the order in which equity might determine the priorities, and so far as the assets of the insolvent company might be sufficient to meet its liabilities. The receiver seems unable to comprehend the fact that the question of *preference or priority as between creditors is one which concerns the creditors only.* In his petition for rehearing filed in the Court of Appeals the receiver said (Transcript of Record, p. 40):

> "We would find no difficulty in agreeing with the conclusion of the Court that the receiver had no interest in the appeal, if we conceded that debt to be a just claim against the estate, for then clearly it would be a matter of indifference to him how it was satisfied. But the concession of the receiver is, that as against the railway company only, and not against the estate, is the claim just."

The manifest answer to this is that the debt of the insolvent railway company to appellee, for material furnished and labor performed, within the period fixed by the Court giving priority to such claims, when properly presented and allowed and proven, or conceded to be just, became a claim against *the estate of the insolvent railway company in the receiver's hands.* The receiver could not pay any debt of the insolvent company which was not a claim against the estate of that com-

pany in his hands as such receiver. The very object of the Court in giving to claims of this character a preference over the mortgage debt was that such claims might be satisfied out of the funds of the insolvent company in the hands of the receiver. The intervener went into court, not for the purpose of securing a valueless judgment against an insolvent railway company, but for the one purpose of having its claim against that company adjudicated and declared to be a lien against the property of that company in the hands of the receiver; and when its claim was presented it was the duty of the receiver to know that the amount of the claim was correct, and that the labor and materials for which the claim was made were of the character made preferred by the order of the Court, and were performed and furnished within the six months. And here his duty ended. The payment of intervener's claim is no more a diminution of the estate than would be the payment of the mortgage debt; the payment of intervener's claim, as well as the payment of the mortgage debt, out of the funds of the insolvent company in the receiver's hands, is simply a distribution of the assets of the estate. From the receiver's standpoint, every payment he makes out of the assets of the estate—the payment of his own salary, the payment of the fees of his counsel, the payment for supplies used by him in the operation of the property—is a diminution of the assets of the estate and should be strenuously opposed, and he will be doing only his duty in "carrying that resistance to the court of last resort." But the one and only defense the receiver makes is that the payment of the claim "displaces the vested lien of the mortgage." This,

and this alone, constitutes his "good and valid defense;" and yet he winces under the judicial finding of the Court of Appeals, that he has "become the partisan advocate, when his duty demands of him impartiality and indifference with respect to the division of the common fund." It is difficult to conceive in what way he could make himself more distinctly, confessedly and avowedly the unsolicited champion of the interests of the uncomplaining mortgagee or purchaser under the foreclosure proceeding, or in what way he could show a greater disregard of his duty to remain impartial as between creditors contesting the right of priority. We submit the stricture of the Court of Appeals needs no apology or modification.

Great stress is placed by the receiver on the case of *McLeod v. City of New Albany, 66 F. R. 378,* cited in the petition for rehearing in the Court of Appeals, as well as in the brief in support of the petition for writ of *certiorari* addressed to this Court. The decision in that case, we contend, is in entire harmony with the decision rendered by the Court of Appeals in this case, and is within the unbroken line of decisions of State, as well as Federal courts, defining the receiver's duties. In the quotation given by the receiver from the *McLeod* case occurs this passage:

> "It was their [receivers'] duty to preserve the estate and to pay the taxes thereon. *If the taxes were illegally laid,* it was their duty, representing all in interest, to contest payment." (The italics are ours.)

In this case it was clearly the duty of the receiver to see that the intervener's claim was just. In the *McLeod* case the Court held that it was the duty of the receiver to see that the taxes were legally laid, and that this

duty devolved upon him as representing all the interests; so we readily concede that, for the purpose of ascertaining the correctness of intervener's claim, the receiver represented all the interests. In the *McLeod* case the Court held that it was the duty of the receiver to contest payment of the taxes if illegally laid. In this case, intervener's claim, taxes, and operating expenses stood on the same footing, and it was as much the duty of the receiver to pay intervener's claim, if just, as it was his duty to pay taxes legally laid and operating expenses. The justness of intervener's claim being conceded, the receiver's duty ended so far as resistance of payment of the claim was concerned. We earnestly and respectfully suggest that the *McLeod* case does not, as claimed by the receiver,

> "present fairly and squarely the question as to whether or not the receiver had sufficient interest in the controversy between various creditors, claiming priority over each other, out of the estate for which he was appointed to conserve, to present the matter for final determination to the court of last resort."

This question, we insist, did not arise in the *McLeod* case. The only question presented in the *McLeod* case was as to whether, in resisting the payment of taxes upon property in the receiver's possession claimed by the receiver to be illegally laid, and hence not a just or valid claim against the estate, the receiver represented all the parties to the original bill. The Court held that for this purpose the receiver did represent all of the parties to the original bill; and so in this case, for the purpose of determining whether intervener's claim was just and valid, the receiver represented the complainant and the defendant railway company in the original bill,

as well as all other parties to the original bill, but he did not and could not represent the complainant in that bill as against the intervener when the question arose as to whether intervener's claim should take preference over the claim of the parties represented by the complainant in the bill of foreclosure.

In every case cited by the receiver in support of his right to take an appeal, such right has been conceded only where the determination of the question involved might work a diminution or increase of the estate as a whole; the same is true of the citations from the text writers. For instance, in the citation from *High on Receivers, Sec. 264*, occurs this language:

> "And although leave may be granted to sue a receiver, he is at liberty to assert any defense which he may have to the action, either by plea, answer or demurrer, and he has the same right of appeal from an adverse judgment for the recovery of funds pertaining to his receivership as the party over whom he was appointed would have had."

And in his citation from *Beach on Receivers, Sec. 716*, occurs this language:

> "The receiver, as a party defendant to an action, has the same right to appeal from a judgment of the Court, affecting the interests of the estate represented by him, that the party or corporation to whom the estate originally belonged would have had if the suit had been brought against them."

In other words, these text writers hold this and only this: that the receiver can make for the party, whose property has been placed in his hands, the same defense that the party himself could make. This principle we do not question; but it being admitted in this case that the railway company could make no defense to appellee's claim—that the claim was just—it follows

of necessity that the receiver cannot resist its payment. The inability on the part of the receiver to comprehend the difference between *diminution of the estate* and *distribution of the assets of the estate* is well illustrated by reference to his petition for a rehearing (p. 47 Transcript of Record), where he says:

> "*It is immaterial whether a receiver represents only the mortgage trustee or all creditors, secured or unsecured, and that in either event it is his right and duty* for the preservation of the estate in his hands for whomsoever may be ultimately entitled thereto, to *resist the diminishing of that estate* by the payment to a general creditor in priority over all other creditors."

We would ask: How can the payment of a creditor, whose claim, conceded to be just, became preferred under the order of the Court, work a "diminishing" of the estate any more than would the payment of the bondholders? And we beg also to ask how the creation of a preference or priority as between creditors can work a diminishing of the estate? And what possible interest has the receiver in the creation of such preference or priority?

The receiver's suggestion that his right to appeal should have been raised on motion to dismiss, and hence could not be made in appellee's brief or argument when the cause was submitted in the Appellate Court, is answered by his admission that such a question can be raised by the Court of its own motion. If the Court will, of its own motion, dismiss, because of the want of appealable interest, the exercise of this power is certainly not abridged because the appellee suggests to the Court such want of appealable interest.

The receiver contends that there is an important distinction between a case of this kind, namely, a pro-

ceeding by a mortgagee to foreclose a mortgage, and a proceeding to wind up a corporation, in this, that in the latter case the Court takes possession of the property for the purpose of distributing it between all classes of creditors, while in the former case the Court takes possession of the property to apply it to the payment of the mortgage debt. In answer to this we suggest: It may be quite true that the purpose for which the Court takes possession of the property in the two classes of cases referred to may be as stated by the receiver, but the purpose for which the Court takes possession of the property can have no possible effect upon the duty of the officer of that Court in whose possession the property is placed. In each case it is the duty of such officer to make distribution in accordance with the order of the Court and not to determine for himself the manner in which distribution shall be made. If the presumption exists in this case that the mortgage debt is valid, there is not only a presumption that the intervener's claim is valid, but its claim is conceded to be valid, and hence the holder of the mortgage debt gains nothing by the presumption in his favor over the concession in favor of the intervener.

In *Mather Humane Transportation Co. v. Anderson, 76 F. R. 164*, cited by the receiver, the question of the appealable interest of the receiver was not raised or passed upon, so that the decision in that case can have no possible bearing upon this.

In *Hook v. Bosworth, 64 F. R. 443*, relied upon by the receiver as sustaining his right to appeal, the Court found that the record was in such condition that

> "it was unable to regard these receivers as representatives of others than the trustee of the mortgage, who is not entitled to the earnings prior to the receivership."

Does the receiver in this case take the position that he represents the trustee and the trustee only, or that in a contest between the trustee and any other party in interest he must represent the trustee as against such party in interest? If such is his position and he relies upon that position as sustaining his right to appeal in this case, then we insist that the mere statement of that position is in itself a sufficient answer to his claim that he has an appealable interest.

The case of *Bosworth v. National Bank, 64 F. R. 615*, is also relied upon by the receiver as sustaining his right to appeal. As to that case, we would say: In the first place, the receiver's right to appeal was not questioned; and, in the second place, the appeal in that case arose out of a contest between the receiver and the bank as to the validity of a lien asserted by the bank to exist in its favor upon certain funds. The insolvent railway company in that case was indebted to the National Bank in the sum of ten thousand dollars, upon which it had paid twenty-five hundred dollars, and for the balance had drawn drafts against a sum due it from another railroad company. The bank insisted that the drawing of these drafts was an appropriation by the insolvent railway company of the amount in the hands of the railway company upon which the drafts had been drawn, and that, therefore, it had a lien upon this fund; the receiver denied that any such lien existed in favor of the bank, and that the money paid to him by the drawing of the drafts did not come into his possession affected by any such lien. The court below sustained the contention of the bank, held that the bank did have a lien on the fund which had come into

the receiver's possession, and directed the receiver to pay the claim of the bank to the extent of this lien. Here was a manifest controversy between the receiver and the bank as to the existence and validity of the alleged lien of the bank upon a certain fund. It was unquestionably the duty of the receiver to contest the validity of this lien, but no such question arises in this case; nor is there any analogy whatever between the questions arising in the two cases. The same answer may be made to the case of *Bosworth v. Francis Hook*, cited by the receiver.

The case of *Thom v. Pittard, 8 U. S. App. 597*, cited by the receiver, sustained the right of receiver to appeal from a judgment rendered against him in an action by an employé to recover for personal injuries, but does not sustain the receiver's right to appeal in this case, because the principles involved in the two cases are wholly unlike. In this case the intervener's claim became preferred by virtue of the order of the appointment of the receiver; in the *Thom* case no such preference existed. In the one case there was a general order making all claims of a certain class preferred; in the other case, no such general order existed; in the *Thom* case the claimant sought to enforce a liability arising out of the negligent act of the receiver, and the Appellate Court held that the receiver had a right to ask the judgment of the Court of Appeals upon the question as to whether the act on his part complained of was negligent or not. No ingenuity can force any analogy between these cases.

The receiver contends that it was his duty to preserve the estate as against all "strangers to the original

controversy." Does he claim that it is his duty to "preserve the estate" against "past due taxes," which he conceded to be justly due; or to "preserve the estate" against the payment of "all current operating expenses;" or to "preserve the estate" against "all past due wages, as shown by the pay-rolls and on such proof as shall be satisfactory to the receiver or receivers?" Under the decree of the Court appointing the receiver in this case, past due taxes, current operating expenses, and past due wages and claims for materials and supplies incurred in the operation and maintenance of the property during the six months last past, and ticket, trackage and traffic balances, are all preferred over the mortgage debt; has the receiver a right to say that under this order he can ask the judgment of the court of last resort as to whether he should pay past due taxes admitted to be legally laid, current operating expenses and past due wages shown by the pay-rolls and shown on proof satisfactory to the receiver to be correct? Has he asked the judgment of the court of last resort in any one of these cases? Had he the right to require the engineer or switchman, who had rendered services within one week prior to his appointment, and whose claim for services so rendered is conceded to be just, to go with the receiver to the court of last resort in order to have the judgment of that court upon the propriety of the order of the court making the preference in the first instance? If he could not have attacked as improvident the order of the court giving to the wages of an employé, earned during the last week preceding the appointment of the receiver, a prior lien over the mortgage debt, how can he attack the same

order as improvident because it gives preference to a creditor of another class?

Felton v. Ackerman, 61 F. R. 225, does not present a single feature similar to the case now before this court. That case holds this, and only this, that, where the claim arises out of the management of the trust estate by the receiver, and the propriety of his action in this regard is questioned, or a claim is asserted against the trust estate based upon some act of the receiver, then the receiver has the right to appeal from an adverse decision of the court which appointed him; and in *Thom v. Pittard, supra*, it was held that, where the receiver contested the claim on the ground that it was invalid, he could appeal. There is no conflict between these cases and the decision of the court below in this case.

POINT II.

In appointing a receiver of the property of an insolvent railway company upon the application of the holders of its mortgage bonds, the court has the right, in the exercise of a reasonable discretion, to direct the payment of claims incurred in the operation of the property in preference to the mortgage debt; the payment of such claims may be made a condition of the appointment of the receiver.

The record is silent as to the evidence heard by the court when the bill of foreclosure in this cause was presented. It does, however, clearly appear from the record that so much of the order appointing the receiver as gave precedence to claims for materials and supplies, incurred within six months, over the mortgage debt, was objected to by the complainant in the

bill of foreclosure at the time the court entered the order, and that the objection was overruled by the court. In the absence of any evidence as to the matters before the court forming the basis for the exercise of its discretion in making this order, the presumption is that the court properly and fairly exercised this discretion. In the application for the appointment, the prayer is that a receiver may be appointed, "according to the course and practice of this court, with the usual powers of receivers in like cases." The application in this cause was made in September, 1893, and we think we may safely say that for more than twenty-five years prior to the making of this application it had been the "course and practice" of the court to which this application was presented, in granting applications of this character, to create uniformly a preference in favor of claims of the character now in question over the lien of the mortgage debt. The printed reports of the federal courts during that period will disclose the fact that time and again the complainant in this cause, the Mercantile Trust Company of New York, had made application to the federal courts for appointment of receivers, and in almost every instance in granting such applications the court had made an order similar to the one made in this cause; and hence the complainant in this cause well knew, before making the application, what the usual "course and practice" of the court was.

In *Turner v. Indianapolis, etc. R. R., 8 Bissell, 315*, cited at length by appellant, Judge Drummond, in referring to this question, says:

> "To refuse to pay anything whatever for past services, or supplies or materials, has never, it is believed, been attempted by any court or demanded by any mortgagee.

> The receiver goes into the possession of the railroad with all its appliances and instrumentalities, with its men at work on the track or running the trains, with its coal, oil, tools and other means of operating the road. The mortgagees have come into court asking it to assume possession of the road to protect their interests. Are the interests of all others, operatives and supply men, who happen to have claims against it at the time, to be absolutely ignored in the case of insolvent companies? I think not.
>
> "It is but fair to say, in the numerous cases which have come before the court, its rulings upon this subject have been generally acquiesced in by the counsel of the mortgagees."

It does not appear from the record in this cause that there was any peculiarity in the nature of appellee's claim which gives the reciver any special or specific ground of objection. Appellee's claim stands upon exactly the same footing as all other claims for supplies and material furnished within the six months preceding the receiver's appointment; in objecting, therefore, to the allowance of appellee's claim the receiver is forced to take the broad ground that, in appointing the receiver, the court could not give preference or priority over the mortgage debt to any claims for supplies or materials furnished at any time prior to the appointment of the receiver.

The *Turner* case was decided in 1878, so that we find that more than twenty years ago the courts recognized as well established the equitable principle, namely: that in appointing a receiver for the property of an insolvent railway company, it was the duty of the court to make provision for the payment of claims for materials and supplies furnished within a certain time prior to the appointment, and to give the payment of such claims preference over the mortgage debt.

From *Fosdick v. Schall, 99 U. S. 235*, we beg to quote as follows:

> "As to the second question, we have no doubt that, when a court of chancery is asked by railroad mortgagees to appoint a receiver of railroad property pending proceedings for foreclosure, the court, in the exercise of a sound judicial discretion, may, as a condition of issuing the necessary order, impose such terms in reference to the payment from the income, during the receivership, of outstanding debts for labor, supplies, equipment, or permanent improvement of the mortgaged property, as may, under the circumstances of the particular case, appear to be reasonable."

Again:

> "Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If, for the convenience of the moment, something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require, as a condition of such order, that what is due from the earnings to the current debt shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do; for even though the mortgage may in terms give a lien upon the profits and income, until possession of the mortgaged premises is actually taken, or something equivalent done, the whole earnings belong to the company and are subject to its control."

As suggested above, this court cannot know, for the record does not disclose, what facts were presented to the court when the application for the appointment of a receiver was made. As a condition, however, of making the appointment, the court had the right, in the exercise of a sound discretion, to say to the complainant in the bill for foreclosure, and so order, that

certain outstanding debts must be paid by the receiver in preference to the mortgage debt. In reply to the complainant's objection to this provision of the decree, the court appointing the receiver in this cause might well have referred complainant to the following language from *Fosdick v. Schall, supra:*

> "The mortgagee has his strict rights which he may enforce in the ordinary way. If he asks no favors, he need grant none. But if he calls upon a court of chancery to put forth its extraordinary powers, and to grant him purely equitable relief, he may with propriety be required to submit to the operation of a rule which always applies in such cases, and do equity in order to get equity. The appointment of a receiver is not a matter of strict right. And such an application always calls for the exercise of judicial discretion. And the chancellor should so mold his order that, while favoring one, injustice is not done to another. If this cannot be accomplished, the application should ordinarily be denied."

So far as we have been able to discover, however, in every case in which the question of the right of the court, when appointing a receiver, to create a preference in favor of claims of this character over the mortgage debt has arisen, such question has arisen only when the order was made subsequent to, and not a condition of, the appointment of the receiver. In no case, in which the order was made in the first instance, or as a condition of the appointment of the receiver, that we have been able to find, has the propriety of such an order been questioned. And we believe that the receiver will concede that not a single case is to be found in State or federal reports in which, when an order of this character was made at the time the receiver was appointed, the receiver has himself questioned the propriety of the order.

The record shows that counsel for the complainant objected to so much of the order as gave preference over the mortgage debt to claims for material and supplies; it does not appear that the objection was insisted upon; in fact, it does not appear that any exception whatever was filed to the order or any part thereof. For aught that appears to the contrary, the objection was simply oral, and by way of suggestion to the court, and was abandoned by the party making it. And hence we contend that, had the complainant in the foreclosure bill appealed from the finding of the trial court in this cause in appellee's favor, it could not now object to that finding upon the ground relied upon by the receiver.

It has been held time and again in the federal courts that the making of an order of this character, as a condition of the appointment of a receiver, is a matter within the judicial discretion of the court; in taking this appeal, therefore, the receiver attacks the judicial discretion of the court which appointed him, and assails as improvident the decree that gave him his official life.

The receiver insists that in no case can the court create a preference in favor of claims for supplies and materials over the lien of the mortgage debt unless there has been a diversion of income to the payment of interest on the bonded debt or to the betterment of the property. To this we answer: First, it does not lie within the mouth of the receiver to make this defense; Second, conceding the correctness of the receiver's contention, if he relies upon the improvidence of the order, it is incumbent upon him to show the facts upon which he bases his contention, and it is not incumbent upon

the appellee to show, in the first instance, that the court exercised a sound or reasonable discretion; and, Third—and repeating what we have before stated—the record being silent as to the matters before the court, the presumption is that the court exercised a sound discretion.

An examination of the authorities cited by appellant upon this branch of the case, as well as many others not referred to by him, will, we assert, establish clearly the position for which we now contend, namely, that in every case where application is made to a court of chancery by bondholders for the appointment of a receiver of an insolvent railroad company and for foreclosure of the mortgage, the court hearing the application and appointing the receiver has the right, in the first instance, and in the exercise of a reasonable discretion, and as a condition of appointing the receiver, to require that such receiver shall pay, out of funds that may come into his hands, or out of the proceeds of a sale of the mortgaged premises, claims for labor and supplies incurred in the operation and maintenance of the property within a certain period prior to the appointment of the receiver.

The question of the propriety of orders of this character is discussed at some length in the recent case of *Drennen et al. v. Mercantile Trust and Deposit Co.* (*Supreme Court of Alabama*), *A. and E. Corp. Cases* (*N. S.*), *Vol. 8, p. 60*, in which the court says:

> "To state the proposition yet more concretely, the equity arises and is rested upon one or another of the three following categories or states of facts: First, that the gross earnings of the corporation before the receivership, to which its operatives and laborers and persons furnishing necessary supplies are, upon all the authorities, entitled in

preference and priority to the bondholders, have been diverted from the payment of their wages and accounts, and paid to the bondholders, or are in the hands of the receiver to be paid to the bondholders, or to be expended by him in the further operation of the corporation's works for the benefit of the bondholders, or have been expended, either before or after the receiver is appointed, in the improvement and betterment of the mortgaged property, whereby the security of the bonds is increased, to the obvious advantage and benefit of the bondholders. Or, second, that whether, strictly speaking, there has been any diversion of gross earnings from the employes, directly or indirectly, to the bondholders, or not, the operatives and laborers have performed services and labor in the improvement and betterment of the mortgaged property, so that such labor and services have inured directly to the benefit of the bondholders, in the enhancement of the value of their security, and hence of their bonds; they thereby securing, in addition to the property embraced in their mortgages, the value of the services of the company's operatives and laborers, which value belongs to such operatives and laborers, and would have been paid to them, it is to be assumed, by the corporation, out of its gross earnings, but for the intervention of the bondholders, and the appointment, at their instance, of the receiver. Or, third, that labor and services have been performed and rendered in carrying on the business of the corporation and keeping it a 'going concern' (the mortgages and bonds evidencing a contemplation of the parties to them that the operations of the corporation should be kept on foot and going, and the necessity therefor, as a means of production of the net income out of which the bonds, principal and interest, are to be paid); that the business has been kept going by the receiver and earnings from it have been realized; that such earnings have been paid to the bondholders, or are held by the receiver; and that the laborers have not been paid for services thus rendered prior to the receivership."

In *Union Trust Company v. Souther, 107 U. S. 591*, the syllabus reads:

"Where the complainant prays for the appointment of a receiver of mortgaged railroad property, pending proceedings for foreclosure, the court, in the exercise of a sound discretion, may, as a condition of granting the prayer, impose such terms touching the application of income arising during the

receivership to the payment of outstanding debts for labor, supplies, equipment or permanent improvement of the property, as under the circumstances of the case appear reasonable."

In the *Souther* case the complainant prayed that the "court will appoint a receiver according to the course and practice of this court with the usual powers of receivers in like cases;" in granting this application the court, of its own motion, directed the receiver to "pay and discharge all amounts due and owing by said railroad company for labor and supplies that may have accrued in the operation and maintenance of such railroad property within six months immediately preceding the rendition of this decree." In the case now before this court the complainant prayed "that a receiver may be appointed according to the course and practice of this court with the usual powers of receivers in like cases," and the order of the court was, in substance, similar to the order of the court in the *Souther* case. In the *Souther* case, claimant filed its intervening petition praying for the allowance of its claim; the claim was allowed and the receiver directed to pay it; the complainant and the receiver filed motions to set aside the order directing the payment of the claim. After the sale of the property the court set aside the order for the payment of the claim and allowed *the complainant alone to answer.* It thus clearly appears, in the *Souther* case, that the court clearly recognized that the receiver was not in a position to object; the complainant, after the order directing the payment of the claim had been set aside, filed its answer and the court heard evidence thereon, but again entered a decree allowing the claim and directing its payment.

In passing upon the appeal of the complainant from this last order, Chief Justice Waite, after citing the rule in *Fosdick v. Schall*, says:

> "To this we adhere, and, in our opinion, the right to impose terms does not depend alone on whether current earnings have been used to pay the mortgage debt, principal or interest, instead of current expenses; many other circumstances may make such an order reasonable, and this case furnishes a striking example."

The case of *Wood v. Guarantee Trust and Safe Deposit Co., 124 U. S. 416*, does not in any degree contravene the position for which we contend, or the rule as laid down in *Fosdick v. Schall*. In fact, the case of *Fosdick v. Schall* is cited in the *Wood* case.

In *Burnham v. Bowen, 111 U. S. 776*, the court quotes with approval from *Fosdick v. Schall*, as follows:

> " 'Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income.' "

And then adds:

> "Such being the case, when a court of chancery, in enforcing the rights of mortgage creditors, takes possession of the mortgaged railroad and thus deprives the company of the power of receiving any further earnings, it ought to do what the company would have been bound to do if it had remained in possession, that is to say, pay out of what it receives from earnings all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings."

It is not contended or even suggested by the receiver that appellee's claim was not in the nature of a current debt, and one which, consequently, should have been paid out of current earnings. In fact, it is conceded that the claim was for labor performed and materials

furnished to the defendant railway company in the operation and maintenance of its property, and hence was one which, in all "equity and good conscience," should have been paid out of the current earnings.

Touching a claim of this character the court, in *Burnham v. Bowen, supra*, says:

> "In the present case, as we have seen, the debt of Bowen was for current expenses and payable out of current earnings. It does not appear from anything in the case that there was any other liability on account of current expenses unprovided for when the receiver took possession, and there was nothing whatever to indicate that this debt would not have been paid at maturity, from the earnings, if the court had not interfered at the instance of the trustee for the protection of the mortgage creditors."

The following language from the same case is strikingly applicable to the case now before this court:

> "It is said, however, that as no part of the income before the appointment of the receiver was used to pay mortgage interest, or to put permanent improvements on the property, or to increase the equipment, there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them."

To this the Court answered:

> "The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. . . . So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. . . . So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound, in equity and good conscience, to use it if no change in the possession had been made."

It is well to note that in the *Burnham* case no order was made in the first instance for the payment of debts owing for current expenses. The receiver was appointed in 1875, and the claim which the court ordered preferred and paid was for coal furnished in 1874. Yet, notwithstanding the fact that the court appointing the receiver had not directed the payment of this or like claims in the first instance, it subsequently made an order providing for the paymeat of this claim, and in approving this order this court said:

> "The business of every railroad company is necessarily done more or less on credit, all parties understanding that current expenses are to be paid out of current earnings. Consequently, it almost always happens that the current income is encumbered to a greater or less extent with current debts made in the prosecution of the business out of which the income is derived."

Nothing can be found in the case of *Farmers' Loan & Trust Co. v. Green Bay Railway Co., 45 F. R. 664*, which is not in harmony with the rule in *Fosdick v. Schall*, so frequently cited with approval; in *Farmers' Loan & Trust Co.* case Judge Jenkins says:

> "The Supreme Court, as I read the opinions has been most careful to limit the doctrine to claims representing that which has inured to the benefit of the mortgaged property, such as labor and supply claims, allowing priority to such claims, because their non-payment would cause cessation of work, supplies and running arrangements, and result in the stoppage of the operation of the road, which, in the interest as well of the bondholders, as well as of the public, is not to be tolerated."

The claim in *Farmers' Loan & Trust Co.* case was for damages resulting from death, and the court held that this was not a claim which could be said in any way to have benefited the mortgaged property.

In *American Loan & Trust Co. v. Railway Company, 46 F. R. 101*, the question arose as to the right of priority in favor of a claim for the original construction of a portion of the road accruing more than six months before the appointment of the receiver. The court held that this was not such a claim as came within the rule authorizing the court to provide for arrears due for operating expenses, in the absence of a showing that there had been a diversion of current funds or income which should have been applied to the payment of the claim. There is nothing in this holding that conflicts with the finding of the trial court in this case. In the *American Loan & Trust Co.* case, the claimant did not seek to come within the provisions of the order appointing the receiver; on the contrary, it clearly appears that his claim was not of the class for the payment of which the court made provision in the first instance, and it was sought to find an equitable basis upon which the claim might rest, and the court held that, in order to furnish this equitable basis, the claimant must show that funds which should have been applied to the payment of his claim had been applied to the payment of interest on the bonded debt. In the case now before this court, the court below, in appointing the receiver, did make provision for the payment of appellee's claim, and the claim was for labor and supplies incurred in the operation of the road within six months preceding the appointment of the receiver.

In *Kneeland v. American Loan & Trust Co., 136 U. S. 89*, Judge Brewer, in delivering the opinion of the court, clearly recognizes, affirms and approves the rule to the effect that, in appointing a receiver, the

court has the unquestioned right to make, as a condition of such appointment, the payment of unsecured claims which have, by uniform rulings of the court, been given an equitable priority. A portion of the syllabus in that case reads as follows:

> "The appointment of the receiver of a railroad vests in the court no absolute control of the property and no general authority to displace vested contract liens, and when a court makes such an appointment it has no right to make the receivership conditional on the payment of any unsecured claims, *except the few which, by the rulings of this court, have been declared to have an equitable priority.*"

The italics in the above citation are ours.

Appellant has failed to cite a single case in which the equitable priority of claims of the character involved in this controversy has not been recognized and enforced. It is interesting to note that the opinion in the *Kneeland* case was delivered in May, 1890; in May of the preceding year, the judge delivering that opinion had, at the instance of the bondholders, appointed a receiver of the property of the St. Louis, Arkansas & Texas Railroad Company, and in making the appointment had directed the receiver to pay,

> "all just claims and accounts for labor and supplies incurred within six months prior to the appointment."

Central Trust Co. v. St. Louis, Arkansas & Texas R. R. Co., 41 F. R. 551. In rendering the opinion in that case, Judge Caldwell quotes from a letter from the judge who rendered the opinion in the *Kneeland* case, as follows:

> "I did not understand from the parties making the application for receiver that there was any desire or thought of cutting off any just claims accruing during the brief

> period which has elapsed since their mortgage was given, and, if counsel or party had any such idea, they much mistake my judgment in the premises."

Judge Caldwell then adds:

> "The better practice is for the judge or court appointing the receiver to stipulate at the time and, as a condition of the appointment of the receiver, what debts and liabilities of the railway company shall be made a charge on the property and paid by the receiver. If the mortgagee is unwilling to take a receiver on the terms imposed, the foreclosure can proceed without a receivership."

In the case before this court, on the very day on which the application was made, and at the time the application was made, the judge said to the applicant that in granting the application and in making the order for the appointment of the receiver, he would direct the payment of demands of the class within which appellee's claim falls; and while the applicant, at the time, objected to this provision of the order, it nevertheless took the receiver, has reaped all the benefits that arose therefrom, and from that day to this, so far as the record discloses, neither the applicant nor any interested party has questioned the propriety of the order.

In *Blair v. St. Louis, etc. Ry. Co., 22 F. R. 421*, it is said:

> "In the order appointing a receiver no provision for the payment of claims was made, and it is conceded that there is nothing to show that since the default in the payment of interest there has been any diversion of income to permanent improvements. Now the broad proposition is laid down by counsel, that, unless a diversion, as stated, is shown, or unless the court, as a condition of appointing a receiver, requires the payment of certain claims, none can be preferred to the mortgage debt. . . . I think the Supreme Court has decided against this claim."

In the *Blair* case it was not contended that the court did not, in the first instance, have the right to make the order; but the contention was that the order, not having been made in the first instance, a receiver having been appointed without the imposition of such a condition, no priority could be created by a subsequent order unless the party seeking such subsequent order could show a diversion; and yet this claim, by no means so broad as the contention of the appellant in this case, the court held could not be sustained.

The equitable rule which provides for the payment of pre-existing debts does not rest upon the ground of diversion alone.

In the case of *Miltenberger v. Logansport Railway Company, 106 U. S. 286* (*l. c. 311*), it is said:

> "Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the *corpus* of the property, *under the order of the court*, with the priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged prop-

> erty in a large sense, by maintaining the good-will and integrity of the enterprise, and entitle them to be made a first lien."

The principle above declared is approved in *Union Trust Co. v. Illinois & Midland Railway Co., 117 U. S. 434.*

In *Wood v. Guarantee Trust and Safe Deposit Co., 128 U. S. 416*, intervener sought to have preferred a claim for a debt contracted by the insolvent in the construction of the water-works at Joliet. In commenting on the argument advanced by the intervener in support of its claim, this court says:

> "First, it (the argument for intervener) overlooks the vital distinction between a debt for construction and one for operating expenses. The doctrine of *Fosdick v. Schall* is applicable wholly to the latter class of liabilities. . . . Secondly, it overlooks the important fact that the doctrine only applies where there is a diversion of the income of a 'going concern' from the purpose to which that income is equitably primarily devoted: viz., the payment of the operating expenses of the concern."

From *Farmers' Loan and Trust Co. v. Kansas City, etc. Railway Co., 53 F. R. 182*, we beg to quote as follows:

> "The court appointing a receiver may impose such conditions as appear to be just and equitable, and the party asking for and accepting the appointment of a receiver on the conditions imposed will be bound thereby."
>
> "And it is an error to suppose that such debts can only be given priority where there has been a diversion of the income of the road; nor is it true that they can only be paid out of earnings of the road and cannot be made a charge on the *corpus* of the property. Diversion of the income is not essential to give them priority, and they may be made a charge upon the *corpus* of the estate if the earnings are not sufficient to pay them.
>
> "It is due to the trustee to say that it has not at any time shown the slightest disposition to break its faith with the creditors or the court in this matter, but, on the

> contrary, has at all times exhibited that high sense of business integrity and honor which should always characterize those engaged in the management and execution of large financial trusts.
>
> "In compliance with the order of the court, the creditors have presented their claims and they have been allowed. . . . The creditors and the public had a right to rely upon the court's order. Courts should keep faith with suitors and the public, if no one else does."

Touching the duty of a receiver, in *Union Trust Co. v. Illinois & Midland Ry. Co., 117 U. S. 434*, it is said:

> "The view taken by the commissioners and confirmed by the Circuit Court was, that the receiver, as an executive officer of the court, was entrusted with all the properties committed to his charge, to use and preserve them, under the directions of the court, for the benefit of all parties in interest."

This definition of the position of the receiver as declared by the commissioners and the Circuit Court is approved by this court.

In the very recent case of *Ames v. Union Pacific R. R. Co., 74 F. R. 335*, the court says:

> "The proposition is now too well settled to permit of argument, that there are certain claims against a mortgaged railroad company accruing before the appointment of a receiver in foreclosure, which are entitled to a preference over a prior mortgage debt, in payment out of the earnings of the railroad during the receivership and out of the proceeds of a sale of its property."

In concluding this branch of the case, we respectfully submit that not a single expression can be found in any case decided by a federal court which militates against our position, namely, that, where the Court of Chancery, appointing a receiver upon the application of the bondholders in a foreclosure proceeding, makes, in the first instance, and as a condition of that ap-

pointment, the payment by the receiver of claims for materials and supplies incurred within six months prior to the appointment of the receiver, the making of such an order is clearly within the sound discretion of the court, and has been uniformly sanctioned and approved by all federal courts.

POINT III.

When the record is silent as to the facts on which the court entered the order preferring claims of a certain class, the Appellate Court will not say such order was improvidently entered.

As the decree directing the payment of intervener's (appellee's) claim was made in pursuance of, and in conformity with, a provision of the order appointing the receiver giving preference over the mortgage debt to claims of a certain character, the finding in this case cannot be assailed unless the general order in pursuance of which it was made can be attacked as improvident. If the general order stands, the finding in this case must stand. We insist the general order must stand because (1), in accordance with the uniform practice of all federal courts for a period of more than twenty-five years, repeatedly sanctioned and approved by this court, (2) founded on equity and good conscience, (3) made as a condition of the appointment of the receiver and acquiesced in by the acceptance of the receiver upon that condition, and (4) not subsequently objected to by any party in interest.

The record does not disclose any part of the evidence upon which the court acted in making the general order in the first instance; and—

> "the rule in equity, as at law, is: that in the absence of all testimony upon which the lower court acted, it will be presumed that everything was established which could have been proved under the pleadings by any reasonable intendment."
>
> *Smith v. Fletcher, 11 S. W. Rep. 824.*

It is not necessary to contend or insist that the judge appointing the receiver in cases of this character has the absolute right to make, as a condition of such an appointment, a decree giving to outstanding debts for labor and supplies incurred in the operation of the property, and which should have been paid out of the current income, priority over the mortgage debt; yet it cannot be denied that the judge has, in such cases, in the exercise of a sound judicial discretion, this power. Hence, in attacking the order in this cause the receiver questions "the sound judicial discretion of the court," and the burden lies upon him (if he is permitted to be heard at all) to show that proper, sound discretion was not exercised. We think it not amiss to suggest, in passing, that the attempt of the receiver, made in this case, to question the discretion of the court in making an order for the disposition of the funds of the receivership, is novel and unique. The term "judicial discretion" or "sound discretion," as used in the opinions of the court, we take it, means simply the right of the judge to decide, upon the evidence submitted, as his best judgment may dictate. The receiver cannot substitute his discretion for that of the trial court, nor will the Appellate Court interfere with the action of the trial court exercised in accordance with the sound discretion of the court in cases where the law gives to that court the right to exercise its discretion. In this case the

court was asked to make the appointment in accordance with its usual course and practice. The usual course and practice of the court had been, for many years, to make just such an order as was made in this cause, and this course and practice had been uniformly sustained by all Appellate Courts into which it had come for review. Hence, the failure of the court to make such an order would have been a departure from its usual course and practice, and would not have been in accordance with the prayer of the foreclosure bill.

It is not incumbent upon the appellee to satisfy this court that, in making the order in this case, the court below exercised a "sound discretion," or to present to the court the facts upon which that discretion was exercised. It is the receiver who is attacking as improvident the order of the court; and it is, therefore, incumbent upon him to show an abuse of the discretionary power of the judge exercised in making the order.

> "In so far as they [trial courts] are vested with discretionary powers, they are presumed to have been properly exercised until the contrary is shown. . . . The rulings of the Circuit Court will be presumed to have been in accordance with the justice and merits of the case, unless the complaining party shows unequivocally that the court has been guilty of an abuse of its discretionary power."
>
> *Detro v. State, 4 Ind. 200.*

Is there anything in the record before this court to show an abuse of discretionary power by the court below in making the order or decree complained of? Is the burden upon appellee to show that there was no abuse of discretionary power? Will this court presume that the court below abused its judicial discretion?

> "If the appellate tribune is compelled to resort to presumptions, it would choose that which sustains the proceed-

> ings of the trial court, and reject that which overthrows it. If the condition of the record is such as to require the higher court to act upon presumptions, it will, without hesitation, adopt the presumption that upholds the judgment from which the appeal is prosecuted."
>
> *Elliott's Appellate Procedure, Sec. 709.*

Again:

> "The rule that all reasonable presumptions and intendments will be made in favor of the rulings of the trial court, is one of the best settled and most frequently applied rules in appellate procedure."
>
> *Ibid., Sec. 710.*

We do not say that in no case will the propriety of an order of this kind made by the court below be subject to review by an Appellate Court. What we insist is: First, that a receiver cannot question the propriety of such an order; and, second, that it is incumbent upon any party in a position, to raise the question, and alleging the abuse of judicial discretion, or complaining of the propriety of such an order, to make it clear from the record that there was such abuse of discretion, or that there was such improvidence in the order. We insist that there is nothing in the record giving any semblance of such a showing. For all that appears to the contrary, the order was entered after hearing of all matters relating to the controversy and full consideration. The record shows that it was entered after hearing argument in opposition, and hence every possible presumption must exist in favor of the order.

It is quite true that, as claimed by appellant, the record now before this court fails to show that appellee, in submitting its claim before the Master in Chancery, offered any proof of diversion by the insolvent railway

company of its income to the payment of interest on its bonded debt prior to the appointment of the receiver. Under the general order of reference, in pursuance of which this claim was referred to the master, and upon the pleadings, no such proof could have been offered before the master, either in support or denial of the claim of diversion. It was not for the master to determine whether or not there had been a diversion. This question was not one which he could pass upon under the general order of reference, nor could it possibly arise upon appellee's intervening petition. Was it for the Master in Chancery to say or find that the court's order was improvident? Did the court delegate to the Master in Chancery by it appointed, the power to determine whether the court had abused its judicial discretion? The one question, and the only question, upon which the master had to pass was, whether appellee's claim was just and embraced within the class preferred by the order of the court. Upon this question the Master in Chancery found in appellee's favor, and the receiver concedes the finding to be correct, and so, when exceptions were filed to the master's report, in passing upon those exceptions the court dealt only with the questions submitted to the Master in Chancery.

In his brief below the receiver good-naturedly criticises the form of the intervening petition, and we beg to acknowledge our indebtedness to him for a very clear and concise exposition of the office of pleading. We readily confess that the intervening petition is informal, but it states, beyond question, every fact necessary to bring appellee's claim within the order of the court making that claim preferred; this was all that appellee desired to present to the court; if there existed

any special defense to the claim which the receiver desired to make, it was certainly his duty to make this defense known; his answer simply requires the claimant to make strict proof of its demand.

Had the question of diversion been submitted to the Master in Chancery, and had he found that there had been no diversion and consequently, in his opinion, appellee's claim should not be allowed, his finding would in effect have been a reversal or modification of the decree of the court—which the Master in Chancery might well have hesitated to make. The receiver apparently feels no such hesitation.

The transcript of record filed in this court is not a complete transcript of all of the proceedings in the foreclosure case; the transcript filed gives only such portions of the record as in the receiver's judgment relate to or bear upon appellee's intervening petition; but the partial transcript does show that before entering the decree from which this appeal is taken the trial court was "sufficiently advised." From the record now before this court, can it be said that the trial court was not sufficiently advised? Is it for appellee to show that the trial court was sufficiently advised?

If the receiver's contention is correct, that appellee's claim should not have been allowed without a specific allegation by the appellee in its petition, and proof before the master, of diversion by the insolvent railway company prior to the appointment of a receiver, then not a single one of the claims of the four classes preferred in the order of the court could have been properly paid by the receiver without a specific allegation and proof in each case of diversion. He had no right to pay an engineer the amount of wages due him for

services rendered during the week preceding the appointment of the receiver until a bill in equity had been filed by the engineer setting forth all the facts in the case and charging diversion. If this is true, the order made in the first instance goes for naught.

The case of the *St. Louis, Alton & Terre Haute Railroad Co. v. C., C., C. & I. R. R. Co., 125 U. S. 658*, so confidently relied upon by the receiver, has no analogy to the case at bar. In that case the claimant did not seek to avail itself of the provisions of the original order. It sought an enlargement of the order; it sought to have allowed and preferred a claim for the payment of which no provision was made in the first instance and which did not fall within the class of claims which had been preferred under previous orders in like cases. Under these circumstances, of course, it was incumbent upon the claimant to show some special equity existing in his favor, and which would justify the court in ordering the payment of its claim.

POINT IV.

An objection to the allowance of a claim, in a receivership proceeding, not made before the Master in Chancery to whom the claim was referred, or in the trial court upon exceptions to the report of the master allowing the claim, cannot be made in the Appellate Court.

Although we should concede to the receiver the possession of that most remarkable and extraordinary power which he now seeks to exercise, namely, the right to attack as improvident the original order of the court creating the preference in favor of claims for materials and supplies over the lien of the mortgage debt,

when we find that the sole basis of his ground of objection is that the record furnishes no evidence of diversion, we beg to suggest that it would have been only fair to the court below and to the intervener that in some way notice should have been given of this objection.

It appears from the record that the receiver accepted his appointment on the day on which the order was entered and without protest against, objection or exception to, the general instruction given him touching payment of claims of this character; that this order was entered in September, 1893, and stood unmodified on May 27, 1895, when appellee's intervening petition was filed, stands to-day, and no appeal was ever taken from the order.

In his exceptions to the master's report, there is no intimation that the receiver intends to make or rely upon this objection, nor in such exceptions is there any suggestion that, in his opinion, the court had failed to exercise proper or sound judicial discretion. In his assignment of errors, we find naught that smacks of such a suggestion, nor in his answer to the intervening petition do we find any trace of a conflict of opinion between himself and the trial court as to the propriety of the order of the court, and yet the alleged improvidence of this order is the ground, and the sole ground, of his appeal.

As before stated, the record is silent as to the evidence heard by the court when the order was entered, and hence does not disclose what proof, if any, touching diversion was submitted to the trial judge. The receiver cannot claim, and especially for the first time in the Appellate Court, that the absence of such proof

renders nugatory the general order of the trial court creating a preference of claims of this character over the lien of the mortgage debt.

We respectfully ask an affirmance of the judgment.

J E McKnight and
Shepard Barclay
M F Worthen
Saint Pleasant

Counsel for Appellee.

Statement of the Case.

BOSWORTH *v.* ST. LOUIS TERMINAL RAILROAD ASSOCIATION.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 211. Submitted January 25, 1899. — Decided May 1, 1899.

A claim was presented against the estate of the Peoria and St. Louis Railway Company in the hands of a receiver, which the receiver disputed. After reference to a master, and his report, stating the facts, an order was entered directing the receiver to pay the claim. He appealed from this decision to the Court of Appeals. The record on appeal contained the order of reference, the findings of fact, the report of the master, and the exceptions of the receiver. The Court of Appeals directed the appeal to be dismissed. *Held*, That the proper entry should have been an affirmance of the decree rather than a dismissal.

A receiver may defend, both in the court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit.

He may likewise defend the estate against all claims which are antagonistic to the rights of both parties to the suit, subject to the limitation that he may not in such defence question any order or decree of the court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the court appointing him.

He cannot question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit.

He may appeal from an order or decree which affects his personal rights, provided it is not an order resting in the discretion of the court.

His right to appeal from an allowance of a claim against the estate does not necessarily fail when the receivership is terminated to the extent of surrendering the property in the possession of the receiver.

THE facts in this case are briefly these: On September 21, 1893, the Mercantile Trust Company, of New York, filed its bill of complaint in the Circuit Court of the United States for the Southern District of Illinois against the Chicago, Peoria and St. Louis Railway Company, praying foreclosure of a mortgage and the appointment of a receiver. On the same day an order was entered appointing the present appellant receiver of that road. Among other things the order of ap-

pointment directed the receiver to pay "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket trackage traffic balances due from said railroad." The plaintiff, the Mercantile Trust Company objected to this part of the order, but after argument the objection was overruled. On May 27, 1895, the Terminal Railroad Association of St. Louis filed an intervening petition, claiming that it had performed labor and furnished materials for the defendant railroad company within the six months named in the order of appointment. The receiver answered, denying the claim. The matter was referred to a master, who found in favor of the petitioner, and on July 30, 1896, the following decree was entered:

"It is therefore ordered, adjudged and decreed by the court that the receiver herein pay to the intervenor, the Terminal Railroad Association of St. Louis, the said sum of eight thousand one hundred and sixty-two dollars and eleven cents ($8162.11) out of the income of said receivership, if any such income is in his hands, and in case he has not the funds in hand for this purpose, it is ordered, adjudged and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and until paid the same is hereby declared a lien upon the said mortgage estate superior to the lien of the mortgage herein."

The receiver appealed from this decree to the Court of Appeals, but on June 8, 1897, that court dismissed the appeal. 53 U. S. App. 302. Thereafter a certiorari was issued, and under that writ the case was brought to this court.

Mr. Bluford Wilson and *Mr. Philip Barton Warren* for appellant.

Mr. M. F. Watts, *Mr. J. E. McKeighan*, *Mr. Shepard Barclay* and *Mr. Samuel P. Wheeler* for appellee.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

Upon the record as it was filed in the Court of Appeals, and independently of other considerations, its decision was manifestly erroneous. A claim was presented against the estate in the hands of the receiver, which he disputed. A part of his contention, as appears from the exceptions, was, specifically, that the debt, whatever its amount, was due from the Jacksonville Southeastern line and not from the mortgagor, the Chicago, Peoria and St. Louis Railway Company. After reference to a master, and his report stating the facts, an order was entered directing the receiver to pay the claim. The reference, the findings, the report of the master, the exceptions of the receiver, were all set forth. So that in the record, as it came to the Court of Appeals, there was a denial on the part of the receiver of any liability of the estate in his possession to the petitioner, and a decree adversely thereto. That alleged liability he was the proper person to contest, and to contest both in the court which had appointed him receiver, and on appeal in the appellate court. But the Court of Appeals, in its opinion directing the dismissal, makes this statement of facts, page 305:

"The contention of the receiver is thus stated in the brief of his counsel: 'The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, or as to the value of the same. The only controversy is as to whether or not the appellee is entitled, on its petition and proof made thereunder, to have the vested lien of the mortgagee displaced to the extent of his claim.' He insists that the provision in the decree appointing a receiver providing for the payment of certain claims as preferential created no vested right; that within our ruling in *Mather Humane Stock Transportation Company* v. *Anderson*, 46 U. S. App. 138, the decree in that regard was interlocutory and is not controlling of the subsequent action of the court; that within the doctrine declared in *Turner* v. *The Indianapolis, Bloomington and Western Railway Com-*

pany, 8 Bissell, 315; *Fosdick* v. *Schall*, 99 U. S. 235; *Union Trust Company* v. *Souther*, 107 U. S. 591; *Burnham* v. *Bowen*, 111 U. S. 776; *Union Trust Company* v. *Illinois Midland Railway Company*, 117 U. S. 434; *Wood* v. *Guarantee Trust and Safe Deposit Company*, 128 U. S. 416; *Kneeland* v. *American Loan and Trust Company*, 138 U. S. 509; *Thomas* v. *Western Car Company*, 149 U. S. 111; *Farmers' Loan and Trust Company* v. *Green Bay, W. & St. P. Railway Company*, 45 Fed. Rep. 664, before a claim can be deemed to be preferential to the mortgage debt there must be first established a diversion of income from the payment of operating expenses to the payment of interest; and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming at the request of a trustee the operation of a railway, has not the right to provide out of the income or the corpus of the road, for the payment of operating expenses incurred within a limited time prior to the suit unless there has been diversion of income, and then only to the extent of such diversion."

And again, page 307:

"The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from the railway had been sold under decree of sale, and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand any moneys with which to pay the debt adjudged."

Even with the change made in the condition of the case by these admissions, we are of opinion that the proper entry should have been an affirmance of the decree rather than a dismissal. A dismissal implies that the receiver had no right to appeal; whereas we are of opinion that he was the proper party to take such appeal, was entitled to a hearing in the Court of Appeals, and also bound the estate in his possession as receiver by any admission of facts. Such admission in this case went so far as to relieve the appellate court from any

necessity of inquiry as to the merits of the claim, but it was made after the case had been taken to the appellate court, and did not affect the rightfulness of the appeal.

It becomes important to consider what are the rights and duties of a receiver in respect to claims made against the estate in his possession. It is often said that he is merely the hand of the court which has appointed him; and for certain purposes that is not an inapt expression. He is charged with the duty of carrying into execution the orders of that court, but he is also a custodian of property, and has by virtue of such custody certain obligations to the parties owning or interested therein.

First. A receiver may defend, both in the court appointing him and by appeal, the estate in his possession against all claims which are antagonistic to the rights of both parties to the suit. For instance, he may thus contest a claim for taxes, because if valid they are superior to the rights of both parties; in a case like the present, superior to the rights of mortgagor and mortgagee.

Second. He may likewise defend the estate against all claims which are antagonistic to the rights of either party to the suit, subject to the limitation that he may not in such defence question any order or decree of the court distributing burdens or apportioning rights between the parties to the suit, or any order or decree resting upon the discretion of the court appointing him. As this is a matter specially pertinent to the present controversy it may be well to consider briefly the scope of this proposition: A suit is brought by a mortgagee to foreclose his mortgage, and a receiver is appointed to take possession of the mortgaged property. The right to have a decree of foreclosure and sale is an absolute right on the part of the mortgagee, flowing from a breach of the conditions in the mortgage. But the appointment of a receiver is a matter resting largely in the discretion of the court — not, of course, an arbitrary but a legal discretion — and depending not simply upon the breach of a condition in the mortgage, but also upon the question of relative injury and benefit to the parties and the public by the taking of the property out of the

possession of the mortgagor and placing it in the hands of a receiver. In appointing a receiver the court has a right, within certain recognized limits, to prescribe the terms and conditions of the appointment. A receivership is not essential to a foreclosure and sale, and the court is charged, when an application therefor is made, with the duty of inquiring whether, under all the circumstances, considering the interests of the parties and the public, it is wise and proper to take possession of the property. It may in its judgment be necessary to appoint a receiver without prescribing any terms. It may be that the interests of the parties or the public require that the appointment shall be made subject to certain conditions. Now, these conditions, whatever they may be, are beyond the challenge of the receiver. He may not say directly or indirectly, "I accept the appointment; I take charge of the property, but I repudiate the terms and conditions imposed on the receivership." Whether under the present state of the statutory law in reference to appeals any review can be had of the terms of such an order, it is clear that a receiver, whose rights spring from the appointment, cannot be heard to question them.

Third. Neither can he question any subsequent order or decree of the court distributing the estate in his hands between the parties to the suit. It is nothing to him whether all of the property is given to the mortgagee or all returned to the mortgagor. He is to stand indifferent between the parties, and may not be heard either in the court which appointed him, or in the appellate court, as to the rightfulness of any order which is a mere order of distribution between the parties. In this connection it must be noticed that an intervenor, although for certain purposes recognized as a party to the litigation, is not such a party as comes within the scope of the limitation just announced. He is one who comes into the litigation asserting a right antagonistic or superior to that of one or both of the parties thereto, and a receiver, who represents, so far as the property is concerned, the interests of the parties, may rightfully challenge his claim; provided that in such challenge he does not question any or-

ders of the court heretofore referred to. Let us take some illustrations: A suit is brought to foreclose a mortgage, a receiver is appointed, and the mortgaged property taken possession of. A party intervenes, asserting that he has a claim against the mortgagor and the property, but conceding that it is subordinate to the claim of the plaintiff mortgagee. With that concession, the mortgagee stands perfectly indifferent to the question whether the claim be allowed or not. Still, it cannot be doubted that in such a case the receiver, holding the property, against which a claim is made, can defend; and defend not only in the court appointing him, but also by appeal. In that defence he not only represents, it may be said, the mortgagor's interests, but also protects the property in his possession.

Take another case: An intervenor presents a claim against the mortgaged property which the mortgagor admits. There is, therefore, no defence to be interposed in behalf of the defendant mortgagor, no protection to be sought for the property, and the only question is whether such claim, admitted by the mortgagor, is to be satisfied out of the mortgaged property prior to the claim of the mortgagee. The latter is the only party who has an antagonistic relation to the intervenor. Now, the receiver, who represents both mortgagee and mortgagor, both plaintiff and defendant, so far as the custody of the property is concerned, is entitled to defend against this claim of priority made by the intervenor, and may defend both in the court appointing him, and also by appeal. It is true in such defence he may not be heard to say that the terms and conditions imposed in the order of his appointment were improper, but he may defend on the proposition that the claim presented does not come within those terms and conditions. Whatever right, if any, the mortgagee plaintiff may have to question, in resisting such claim, the validity of the terms of the appointment, the receiver cannot do so; and the only defence he can make is that the claimed priority has no foundation in the terms of the order; or, if it be a matter entirely outside of those terms, that it has no foundation in any recognized legal or equitable principle.

In the case at bar one defence, as shown by the exceptions taken to the report of the master, was that the claim of the intervenor was not against the estate, but against some third party. That defence the receiver had a right to make. We do not mean that he alone can act; we do not stop to inquire what rights either party to the suit may have in this respect. All we now decide is that the receiver is a proper party to make the defence. And when he alone makes it, when he carries on the litigation in his own name as receiver, then as the representative and custodian of the estate he can, subject to the supervision of the court, bind it by admissions made in good faith in the progress of the litigation. And as in the appellate court, after the appeal had been perfected, he being the only party to the appeal, admitted that it was a just claim against the mortgagor and within the priority over the mortgage prescribed in the order of appointment, his admission showed that the allowance was right, and that the decree ought to be affirmed. But still, until that admission was made, there was a pending dispute, and he was a proper person to appeal from the allowance.

Fourth. He may appeal from an order or decree which affects his personal rights, provided it is not an order resting in the discretion of the court. Thus he may not appeal from an order discharging or removing him, or one directing him in the administration of the estate, as for instance to issue receiver's certificates, to make improvements, or matters of that kind, all of which depend on the sound discretion of the trial court. He may appeal from an order disallowing him commissions or fees, because that affects him personally, is not a matter purely of discretion, and does not delay or interfere with the orderly administration of the estate.

Fifth. His right to appeal from an allowance of a claim against the estate does not necessarily fail when the receivership is terminated to the extent of surrendering the property in the possession of the receiver. It is a common practice in courts of equity, anxious as they are to be relieved of the care of property, to turn it over to the parties held entitled thereto, even before the final settlement of all claims against it, and at

the same time to leave to the receiver the further defence of such claims, the party receiving the property giving security to abide by any decrees which may finally be entered against the estate. An admission that the railway property had been turned over to the purchaser is not therefore of itself conclusive against the right of the receiver to appeal. And the fact that the trial court allowed the appeal must in the appellate court be taken, in the absence of other evidence, as sufficient authentication that such reservation of authority had been made in the order directing the surrender of the property.

It seems unnecessary to say more. We have indicated, so far as it can safely be done by general propositions, the powers of a receiver in respect to appellate proceedings. We are of opinion that the decree of the Court of Appeals should have been one of affirmance, and to that extent it is modified. Under the admissions of the receiver the cost of the appellate proceedings should be paid by him, and this notwithstanding, in our judgment, the formal order of the Court of Appeals dismissing the case was incorrect.

The judgment of the Circuit Court is affirmed at the cost of the appellant.